SUPREME COURT OF THE UNITED STATES

No. 14-212

Title:	Jeremy Carroll, Petitioner
	v.
	Andrew Carman, et ux.
Docketed:	August 22, 2014
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Nos.:	(13-2371)
Decision Date:	May 15, 2014

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 12 2014	Petition for a writ of certiorari filed. (Response due September 22, 2014)
Aug 27 2014	Brief of respondents Andrew Carman, et ux. in opposition filed.
Sep 9 2014	Brief amici curiae of Michigan, et al. filed.
Sep 9 2014	Reply of petitioner Jeremy Carroll filed. (Distributed)
Sep 10 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	DISTRIBUTED for Conference of October 10, 2014.
Oct 14 2014	DISTRIBUTED for Conference of October 17, 2014.
Oct 27 2014	DISTRIBUTED for Conference of October 31, 2014.
Nov 3 2014	DISTRIBUTED for Conference of November 7, 2014.
Nov 10 2014	Petition GRANTED. Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)
Dec 12 2014	JUDGMENT ISSUED.

RECORD AND BRIEFS

14-212

No. _____

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

JEREMY CARROLL,
Petitioner

v.

ANDREW CARMAN AND KAREN CARMAN,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A jury found that a state trooper acted reasonably when, seeking to conduct a "knock and talk," he approached the back door of a residence because it appeared to be a customary entrance used by visitors. The questions presented are:

1. When a police officer approaches a residence to conduct a "knock and talk," does the Fourth Amendment require the officer to go to the "front door" even where it reasonably appears that some other entrance is also customarily used by visitors?

2. Did the Court of Appeals err in holding that such a rule was "clearly established" for purposes of qualified immunity?

PARTIES TO THE PROCEEDING

Petitioner is Jeremy Carroll, a Trooper with the Pennsylvania State Police.

Respondents are Andrew and Karen Carman.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 2014. This petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST., Amend. IV.

STATEMENT OF THE CASE

Petitioner Jeremy Carroll is a Trooper with the Pennsylvania State Police. Respondents Andrew and Karen Carman sued Trooper Carroll, claiming, *inter alia*, that he had unlawfully entered their property when he sought to speak with them while conducting an investigation; specifically, they complained that he had approached their residence via the back door rather than the front door. A jury, however, found that the back door reasonably appeared to be the customary entry for visitors arriving at the house by

car, and that Trooper Carroll therefore had not violated the Fourth Amendment. The Third Circuit overturned the verdict, holding that a "'knock and talk' encounter *must* begin at the front door," Pet. App. 10a (emphasis added); and that this rule was "clearly established" for purposes of qualified immunity.

1. On July 3, 2009, Trooper Carroll was ordered to search for a man named Michael Zita, a parolee who had stolen two loaded handguns and a car from New Jersey. Trooper Carroll was told that Zita might have fled to 101 Raspberry Path in Dingman's Ferry.[1] Around the same time, Trooper Brian Roberts[2] received a similar dispatch. Neither trooper knew the age or physical appearance of Zita, neither had previously been to the Raspberry Path address, and they had no warrant to search the house or to arrest Zita. Pet. App. 3a. Troopers Carroll and Roberts, traveling in separate vehicles, arrived at the house – the residence of the Carmans – around 2:30 in the afternoon. COA App. 61 (trial testimony of Trooper Roberts).[3]

The house at 101 Raspberry Path was located on a corner lot, with a street running along the front of the house and a street running along the left (as viewed from the front). No parking was permitted in front of the house; but numerous cars were parked in a graveled area along the left side of the property and

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[1] Dingman's Ferry is in Pike County, in the northeast corner of the Commonwealth near the Pennsylvania-New Jersey border.

[2] Trooper Roberts was not sued in this action.

[3] The Court of Appeals appendix will be cited as "COA App." followed by the page number.

adjoining the Carmans' back yard.[4] Pet. App. 4a. The back yard was not fenced in and contained no indication that it was closed off from visitors, but was open to public view and easily accessible to the public; anyone could cut across the back yard if they so desired. Pet. App. 15a, 29a; COA App. 50 (trial testimony of Ms. Carman). Upon arriving, the two troopers turned down the side street and parked in the next available spaces in the parking area. Pet. App. 4a.

At the back of the Carmans' house was a large deck, standing a foot or so off the ground and reached from the yard by two short sets of steps. The deck in turn led to an entrance to the house.[5] Pet. App. 15a. Due to the layout of the property and parking area, the entrance from the deck appeared to be a customary entryway used by visitors arriving by car, so the troopers headed in that direction.[6] Pet. App. 4a, 15a. As the troopers approached the house, they

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[4] While there was no barrier of any kind between the graveled parking area and the back yard, the record does not reflect whether the parking area was actually part of the Carmans' property.

[5] A photograph of the deck appears at Pet. App. 15a. In that photograph, there appears to be a gate closing off the stairs leading to the deck from the parking area. This gate, however, was not present on the day in question, but was only installed afterward. COA App. 93 (trial testimony of Trooper Carroll).

[6] The Court of Appeals repeatedly characterized the troopers as having "bypassed" the front door. Pet. App. 2a, 11a, 12a. But upon exiting their vehicles, the troopers were already in the back of the property, facing the back of the house. The Court of Appeals did not explain how their decision not to walk around the house amounted to "bypassing" the front door. *Cf.* Pet. App. 3a n. 2 (recognizing the obligation to construe the facts "in the light most favorable to Carroll").

noticed a small outbuilding at the rear of the property with an open door and illuminated interior light. There appeared to be someone inside the structure. Trooper Carroll walked over to the door and announced his presence. No one was there, however, so the troopers continued toward the house. Pet. App. 4a.

Just as the troopers stepped onto the deck, Mr. Carman came out of the house and aggressively approached the troopers. A small scuffle ensued. When things settled down, the troopers determined that Mr. Carman was not the armed suspect they were seeking, but that the Carmans did know Zita. With Ms. Carman's consent, the troopers searched the house for Zita, but found no one. Pet. App. 4a-5a.

After the search, the Carmans did not ask the troopers to leave. Rather, the troopers talked with the Carmans in their kitchen for 20 or 30 minutes. Mr. Carman apologized, shook Trooper Carroll's hand, and explained that he was under a lot of stress because the day before, the Carmans had attended the sentencing of the individual responsible for their daughter's death, COA App. 86-87 (trial testimony of Trooper Carroll); and at trial, Mr. Carman confirmed that he had not been upset because the troopers had approached his house via the back door. COA App. 35-36 (trial testimony of Mr. Carman). The troopers then left. Pet. App. 5a.

2. The Carmans brought this action against Trooper Carroll, claiming among other things that his entry onto their property had violated their rights under the Fourth Amendment.[7] Trooper Carroll

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[7] The Carmans also claimed that Trooper Carroll had unreasonably seized and used excessive force on Mr. Carman when they scuffled; and that Ms. Carman's consent to the search

conceded that he had no warrant for his entry and claimed no exigent circumstances, but justified his entry on the so-called "knock and talk" exception to the warrant requirement. The district court summarized that exception as follows:

> [O]fficers are allowed to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may. . . . Officers should restrict their movements to walkways, driveways, porches and places where visitors could be expected to go.

Pet. App. 28a (internal quotation marks and citations omitted). The district court denied the Carmans' motion for summary judgment on this issue because,

> [b]ased on [Trooper Carroll's] observations and subsequent actions, we find that there exists a question of whether [his] actions were reasonable in attempting a "knock and talk." We find that this question should be answered by the jury.

Pet. App. 30a.

Prior to trial, the Carmans moved for judgment as a matter of law based upon the Court's then-recent decision in *Florida v. Jardines*, ___ U.S. ___, 133 S.Ct. 1409 (2013). The Carmans renewed their motion at the close of opening arguments and again at the close of the evidence. For his part, Trooper Carroll sought judgment as a matter of law based upon qualified immunity. All these motions were denied.

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of their home had not been voluntary. *See* Pet. App. 33a-38a. The jury found for Trooper Carroll on both claims. The Court of Appeals affirmed on the seizure/excessive force claim, Pet. App. 13a-14a; and the Carmans did not appeal on the consent-to-search claim.

Over the Carmans' objections, the district court instructed the jury on the "knock and talk" doctrine as follows:

> This doctrine allows officers without a warrant to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants, just as any private citizen might. Officers should restrict their movements to walkways, driveway, porches and places where visitors could be expected to go.

COA App. 156-57 (jury charge). After a two-day trial, the jury returned a verdict in Trooper Carroll's favor. No post-trial motions were filed.

3. The Court of Appeals reversed in relevant part, holding that the District Court should have granted the Carmans judgment as a matter of law on their unlawful entry claim.[8] Pet. App. 13a.

Invoking the Court's remark in *Jardines* that "'the knocker on the front door is treated as an invitation or license to attempt an entry,'" the Court of Appeals concluded that the front door is therefore the *only* permissible approach to a residence: "a 'knock and talk' encounter *must* begin at the front door because that is where police officers, like any other visitors, have an implied invitation to go." Pet. App. 10a (emphasis added).

While the Court of Appeals recognized that "there may be some instances in which the front door is not *the* entrance used by visitors," Pet. App. 9a n. 6 (emphasis added), the court did not allow for the

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[8] As discussed above, the court affirmed the judgment in favor of Trooper Carroll on the claim that he had unreasonably seized, and used excessive force on, Mr. Carman. Pet. App. 13a-14a.

possibility that a residence might have more than one entrance customarily used by visitors; nor did the court discuss the jury's finding that this was such a situation. Rather, the Court of Appeals' holding was categorical: "Carroll cannot avail himself of the 'knock and talk' exception ... because he entered the back of the Carmans' property"; "[t]he 'knock and talk' exception requires that police officers begin their encounter at the front door"; "[b]ecause Carroll did not knock on the Carmans' front door, his intrusion cannot be justified as a 'knock and talk.' " Pet. App. 11a.

Finally, the Court of Appeals held that Trooper Carroll was not entitled to qualified immunity, relying on its decision in *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003). Pet. App. 12a-13a. In *Marasco*, officers had first approached a front door and, getting no response, had then ventured (at least twice) into the back yard and garage; and the Court of Appeals held that the reasonableness of the officers' actions presented a question for a jury. *Id.*, 318 F.3d at 519-521. The Court of Appeals cited *Marasco* as establishing that " 'entry into the curtilage' could be justified only '*after not receiving an answer at the front door.*' " Pet. App. 12a, *quoting Marasco*, at 520 (emphasis added by the Court of Appeals).

REASONS FOR GRANTING THE WRIT

I. The Court Should Review The Court Of Appeals' Categorical "Front Door" Rule.

A. The Court of Appeals' categorical rule conflicts with the holdings of other federal and state appellate courts, including the Supreme Court of New Jersey.

The Court of Appeals held that an officer attempting a "knock and talk" must always approach a residence via the front door unless the front door "is not *the* entrance used by visitors." Pet. App. 9a & n. 6 (emphasis added). At least four other Courts of Appeals and two state supreme courts have held otherwise, recognizing that: a) a residence may have more than one entrance customarily used by uninvited visitors; b) a police officer may approach via *any* route that an uninvited visitor might reasonably be expected to use; and c) whether such an officer acted reasonably must be evaluated not under a categorical rule but in view of the totality of the circumstances confronting the officer.

In *U.S. v. James*, 40 F.3d 850 (7th Cir. 1994), *vacated on other grounds*, 516 U.S. 1022 (1995), an officer went to the rear side door of a duplex to conduct a "knock and talk," and observed contraband and the attempted destruction of evidence through a window; he then entered and searched the premises and made multiple arrests. *Id.* at 856-857. One of those arrested moved to suppress the evidence, arguing that it was tainted by the officer's entry upon the rear curtilage of the duplex. *Id.* at 861.

In affirming the district court's denial of the motion to suppress, the Seventh Circuit rejected a rigid rule that "police officers seeking to interview a person are always required to knock on the front door of a residence before they may approach any other public means of access to the dwelling." *Id.* at 862 n.4. Instead, the court looked to the reasonableness of the officer's actions in light of the facts confronting him: the passage to the rear door was not impeded by a gate or fence; both the paved walkway and rear door were accessible to the general public; and the rear door was commonly used for entering the dwelling from the nearby alley. *Id.* at 862. "[W]here the back door of a residence is readily accessible to the general public, the Fourth Amendment is not implicated when police officers approach that door in the reasonable belief that it is *a* principal means of access to the dwelling." *Id.* (emphasis added).

Other courts of appeals have likewise rejected categorical rules, examining instead the objective reasonableness of the officer's actions under the circumstances. For example, in *U.S. v. Titemore*, 437 F.3d 251 (2d Cir. 2006), the court held that no Fourth Amendment violation occurred when an officer walked across a lawn to a side porch, where the lawn and porch were not enclosed and the porch was "*a* primary entrance visible to and used by the public." *Id.*, at 259 (emphasis added). As the district court in that case said,

> the law does not require an officer to determine which door most closely approximates the Platonic form of "main entrance" and then, after successfully completing this metaphysical inquiry, approach only that door. An officer making a "knock and talk" visit may approach any part of

> the building where uninvited visitors could be expected.

U.S. v. Titemore, 335 F.Supp.2d 502, 505-506 (D.Vt. 2004). *Accord U.S. v. Thomas*, 430 F.3d 274 (6th Cir. 2006) (no violation of the Fourth Amendment when police officers, seeking to speak with the occupant, approached both the rear and front doors simultaneously); *U.S. v. Garcia*, 997 F.2d 1273, 1279-1280 (9th Cir. 1993) ("[i]f the front and back of a residence are readily accessible from a public place, ... the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as *a* principal entrance to the dwelling") (emphasis added).

Even where courts of appeals have held that an officer's entry was improper, the determination was based upon the reasonableness of the officers' actions under the circumstances – not a categorical "front door" rule. *See, e.g., U.S. v. Wells*, 648 F.3d 671, 680 (8th Cir. 2011) (officers' entry into defendant's back yard could not be justified as a "knock and talk" where officers approached home at 4:00 a.m., the back yard was fenced in and neither visible nor accessible from the street, and the officers made no attempt to raise defendant at the front door they walked past).

Police officers in New Jersey are in a particularly awkward position, since conduct held lawful by that State's highest court has now been declared unlawful by the Third Circuit. In *State of New Jersey v. Domicz*, 907 A.2d 395 (N.J. 2006), as in the case at bar, an officer approached a rear door because, based on "the location of cars in defendant's driveway, it appeared to [the officer] that the back door was used as *an* entrance to the home." *Id.* at 398 (emphasis added). Unlike the Third Circuit, the New Jersey Supreme Court held that "when a law enforcement

officer walks to a front *or back door* for the purpose of making contact with a resident and reasonably believes that the door is used by visitors, he is not unconstitutionally trespassing...." *Id.* at 405 (emphasis added). *Accord, Timble v. State of Indiana*, 842 N.E.2d 798, 801-802 (In. 2006) (no Fourth Amendment violation in approaching back door where "most" of the traffic entered that way; "[w]hich areas of a given piece of real estate may reasonably be viewed as open to the public is fact-specific").

Had this case arisen, then, in the Second, Sixth, Seventh, or Ninth Circuits, or in the state courts of New Jersey or Indiana, it would certainly have been decided differently. Although each of the above cases addresses a unique property layout and set of circumstances, that, of course, is precisely the point: the Third Circuit's rigid approach is unsuited to a complex world. The Court should review this case to resolve the conflict in Fourth Amendment jurisprudence the Third Circuit has created.

B. How a police officer may lawfully approach a residence to conduct a "knock and talk" is an important issue that daily confronts officers.

Law enforcement officers of all stripes approach residences every day to interview witnesses, suspects and victims, and otherwise to perform their duties. As the cases cited above illustrate, the legitimacy of these visits is frequently challenged in both criminal and civil cases; and in most courts is resolved by applying the Fourth Amendment standard of objective reasonableness to the facts of a particular case. However, the Third Circuit's categorical rule that for every residence there is one, and only one, permissible

approach has injected an element of uncertainty that threatens to hamper this basic police function.

With reasonableness excised from the analysis, police officers can no longer rely upon common sense and societal norms. When a residence has no clear "front door" or "main entrance," must the officer encircle the property to determine which entrance best fits the "Platonic form of 'main entrance'"? *Titemore*, 335 F.Supp.2d at 505-06. If the front door "appears" to be inaccessible, is that good enough or must the officer make certain of it? *See U.S. v. Shuck*, 713 F.3d 563, 565-568 (10th Cir. 2013) (no Fourth Amendment violation when officers approached the back door when a gate leading to the front door "appeared" to be locked). What if the officers reasonably but mistakenly believe that they *are* at the front door? *See U.S. v. Garcia*, 997 F.2d 1273, 1279 (9th Cir. 1993). If the Carmans had been visible to the officers through their sliding glass door, would the troopers have had to ignore them on their mandatory march to the front door? *See U.S. v. Cota-Lopez*, 104 Fed.Appx. 931, 933 (5th Cir. 2004) (officers could see resident inside screen door to garage). What if they had been sitting on their deck? At what point and in what instances may police officers deviate from the Court of Appeals' preprogrammed track to the "front door"?

The Court should review this case to provide guidance to law enforcement officers on the use of this routine, but vital, practice.

C. The Third Circuit's categorical rule is inconsistent with the governing principles of Fourth Amendment jurisprudence.

The Court of Appeals' categorical "front door" rule is grounded in misunderstandings, both of the "knock and talk" rule specifically, and of the more general Fourth Amendment principles which it reflects.

1. The Third Circuit reduces the "knock and talk" rule to a rigid caricature of itself.

First, the Court of Appeals confused a common shorthand for the "knock and talk" rule – "police may knock at the front door" – with the rule itself, which is broader and more nuanced. There is no question that knocking on a front door is the quintessential activity permitted by the rule. As the Court said in *Jardines*:

> the knocker on the front door is treated as an invitation or license to attempt an entry.... This implicit license typically permits the visitor to approach the home by the front path....

Id. at 1415. But there is no sound reason to suppose that the rule permits *only* this activity. Rather, the rule is rooted in "background social norms," *id.* at 1416, that permit an officer to approach whenever approaching is "no more than any private citizen might do." *Ibid* (internal quotation marks and citation omitted). And when, under the circumstances of a particular case, there reasonably appears to be an "implicit license [that] permits the visitor to approach the home" by some path other than, or in addition to, the front path, a police officer may do likewise.

Thus, a "knock and talk" does not offend the Fourth Amendment as long as a police officer uses a route that any uninvited visitor could reasonably be

expected to use. Such an entry neither infringes upon the owner's interest in freedom from physical intrusion, *see id.* at 1414, nor invades any reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967). "It is not objectionable for an officer to come upon that part of the property which has been opened to public common use. The route any visitor to a residence would use is not private in the Fourth Amendment sense . . ." 1 Wayne R. LaFave, *Search and Seizure: A Treaty on the Fourth Amendment* § 2.3(e), at 773-774 (5th ed. 2012 update) (internal quotation marks and citations omitted).

The question is not whether Trooper Carroll approached the front door or a door with a knocker, but rather whether he approached the house using a route that reasonably appeared to have been provided for visitors. A jury found that he had.

2. The Third Circuit's categorical rule strips reasonableness from the Fourth Amendment analysis.

Second, the Court of Appeal's categorical rule cannot be reconciled with the established principles that "[t]he touchstone of the Fourth Amendment is reasonableness," *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), measured by the totality of the circumstances facing an officer; and that standards of reasonableness under the Fourth Amendment are not susceptible to "Procrustean application." *Ker v. California*, 374 U.S. 23, 33 (1963).

Thus, the Court has consistently resisted, in a wide variety of contexts, attempts to reduce the Fourth Amendment to "a neat set of legal rules." *Omelas v. U.S.*, 517 U.S. 690, 695 (1996) (internal quotation marks and citation omitted). *See, e.g.,*

Missouri v. McNeely, ___ U.S. ____, 133 S.Ct. 1552, 1561 (2013) (declining to adopt a categorical rule defining exigent circumstances); *Scott v. Harris*, 550 U.S. 372, 383 (2007)("[a]lthough respondent's attempt to craft an easy-to-apply legal test in the [excessive force] context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness' "); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (voluntariness of consent to search not susceptible to "bright-line rules"); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (declining to create a "rigid rule" that requires a knock and announce in every instance before entering a home); *Illinois v. Gates*, 462 U.S. 213, 244 (1983) (abandoning rigid test for determining whether an informant's tip establishes probable-cause).

Certainly there are issues, even in the Fourth Amendment context, that are amenable to bright-line rules. *See, e.g., Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473 (2014) (police may not routinely conduct a search-incident-to-arrest of the contents of a cell phone). But this is not one of them. Whether a given approach to a particular residence is one that could reasonably be expected to be taken by an uninvited visitor is, like the existence of probable cause or the existence of exigent circumstances, an inherently fact-specific inquiry.

For example, a house, as in this case, may have one entrance customarily used by visitors arriving by foot and another used by visitors arriving by car. The "front door" of a beach house typically faces the water, with its "back door" on the access road; visitors coming up from the beach would approach one way, while deliveries would arrive from the rear. At a lakeside home with a dock, any visitor arriving by boat – say, a fish and game officer – would approach

from that direction no matter which way the "front door" faced. Or a house may have no easily identifiable "front door." *See, e.g., Titemore*, 437 F.3d at 253; *Garcia*, 997 F.2d at 1279.

In short, the world in which law enforcement officers work – the real world – is under no obligation to conform to the Court of Appeals' neat categories. The Court of Appeals' rigid categorical rule does not square either with the realities of police work or with the governing principles of Fourth Amendment law long established by this Court. The Court should review and correct this error.

II. The Court Should Review The Court Of Appeals' Misapplication Of The "Clearly Established" Doctrine.

Even assuming that the Court of Appeals' categorical "front door" rule is a correct formulation of Fourth Amendment law, that court's further holding – that, for purposes of qualified immunity, this rule was "clearly established" at the time of the events in question – is gravely mistaken, and likewise deserves review. *See* Pet. App. 12a-13a.

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 599 (2004) (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). The officer should not be subject to liability if the law at the time did not "clearly establish" that the officer's conduct would violate the Constitution. *Id.* "[T]he focus is on whether the officer had fair notice that her conduct was unlawful . . . " *Id.* The Court has admonished that to be clearly established, "[t]he contours of [a]

right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

"[T]his inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' " *Haugen*, 543 U.S. at 599 (quoting *Katz*, 533 U.S. at 201). The Court has " 'repeatedly told courts ... not to define clearly established law at a high level of generality' ... since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, ___ U.S. ___, 134 S.Ct. 2012, 2023 (2014) (quoting *Ashcroft v. al–Kidd*, 563 U.S. ___, 131 S.Ct. 2074, 2084 (2011)) (citation omitted). The Court has been particularly diligent about this requirement in Fourth Amendment cases, where the reasonableness of the actions uniquely depends upon the circumstances facing the officer. *See e.g. al-Kidd*, 131 S.Ct. at 2084; *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson*, 483 U.S. at 639-40. Thus, to defeat qualified immunity any "existing precedent must have placed the statutory or constitutional question *beyond debate*." *al–Kidd*, 131 S.Ct. at 2083 (emphasis added).

In this case, no holding of this Court had established the categorical rule formulated by the Court of Appeals – *Jardines*, on which the Court of Appeals (mistakenly) relied to support its rule, was not decided until 2013 – and the Court of Appeals did not pretend otherwise. Nor did the Court of Appeals draw upon the decisions of other circuits since, as we have shown, no such support exists. Instead, the Court of Appeals relied entirely on its own earlier decision in *Estate of Smith v. Marasco*, 318 F.2d 496 (3d Cir. 2003). Pet. App. 12a-13a. But even here the court erred.

In *Marasco*, police officers knocked on a front door and, receiving no answer, entered the residence's back yard "at least twice," looked around and entered the garage. *Id.* at 521. The Court of Appeals held that "their entry into the curtilage after not receiving an answer at the front door might be reasonable," and that this question should be resolved by a jury. *Id.* at 520-521, *quoted in part* at Pet. App. 12a. But the *Marasco* court did not address, and under the circumstances of that case had no reason to address, whether this was the *only* circumstance that might justify an approach to the rear of a residence. To the contrary, *Marasco* elsewhere recognized the general rule that "[o]fficers are allowed to knock on a residence's door *or otherwise approach the residence* ... just as any private citizen may." *Id.* at 519 (emphasis added).

A year before the "knock and talk" at issue, a different district court judge cited *Marasco* in the course of holding that a code enforcement officer did not violate the Fourth Amendment when he approached a "common entrance" on the *side* of an apartment building. *Lease v. Tyler*, 2008 WL 2673381, *6 (M.D. Pa. 2008). An officer should not be held to be "plainly incompetent" based upon a reading of *Marasco* that not even the courts recognized prior to this case. *Cf. Stanton v. Sims*, ___ U.S. ___, 134 S.Ct. 3, 7 (2013) (officer entitled to qualified immunity based upon, among other things, district court readings of the governing circuit decision).

Thus, nothing in *Marasco* gave "fair notice" that, henceforth, law enforcement officers would be required to approach the "front door," and only the "front door," regardless of circumstances. The Court should review the Court of Appeals' serious misunderstanding of qualified immunity.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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August 12, 2014

COUNSEL FOR PETITIONER

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-2371

ANDREW CARMAN and KAREN CARMAN,
Appellants

v.

JEREMY CARROLL

On Appeal From the United States District Court for the Middle District of Pennsylvania
(No. 3:10-cv-01013)
District Judge: Honorable James M. Munley

Argued: December 17, 2013

Before: MCKEE, *Chief Judge*, FUENTES, *Circuit Judge*, and SCHILLER, *District Judge*.[1]

(Opinion Filed: May 15, 2014)

Barry H. Dyller, Esq. [ARGUED]
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[1] Honorable Berle M. Schiller, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

FUENTES, *Circuit Judge*:

Responding to a police dispatch, Pennsylvania State Trooper Jeremy Carroll and another trooper proceeded to the home of Andrew and Karen Carman to search for a man who had stolen two loaded handguns and a car with New Jersey plates. Upon arriving at the Carmans' residence, the troopers bypassed the front door and went directly to the back of the house and onto a deck adjoining the kitchen. On the deck, a scuffle ensued between Carroll and Andrew Carman. This § 1983 action arises from Carroll's warrantless entry onto the Carmans' property. Carroll contends that he did not violate the Carmans' Fourth Amendment rights because he entered into their curtilage, the area immediately surrounding their home, while executing a legitimate "knock and talk" encounter. Because Carroll

proceeded directly through the back of the Carmans' property and did not begin his visit at the front door, the "knock and talk" exception to the warrant requirement does not apply. Therefore, we reverse the District Court's denial of the Carmans' motion for judgment as a matter of law on their unlawful entry claim. We affirm the jury verdict regarding the Carmans' unlawful seizure claim because there was sufficient support for the jury's finding that Carroll acted reasonably.[2] Accordingly, we affirm in part and reverse in part the judgment of the District Court.

I.

A.

In July 2009, Pennsylvania State Police Troopers Jeremy Carroll and Brian Roberts were dispatched to the Carmans' residence to search for a man named Michael Zita and a car bearing New Jersey license plates. The troopers were told that Zita had stolen the car, was armed with two loaded handguns, and might have fled to the Carmans' residence. Neither Roberts nor Carroll had been to the Carmans' property before, and neither knew what Zita looked like. The troopers did not have a warrant to search the Carmans' property nor did they have a warrant to arrest Zita.

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[2] In reviewing a jury verdict, "[w]e are not free to weigh the evidence or to pass on the credibility of witnesses," but rather "[o]ur function is to determine only whether there is evidence upon which the jury could properly return a verdict, viewing the evidence most favorably to . . the non-movant, and giving [the non-movant] the benefit of all reasonable inferences." *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 961-62 (3d Cir. 1988). Therefore, we construe the facts in the light most favorable to Carroll, the non-movant.

The Carmans' house sits on a corner lot. The main street runs along the front of the house and a side street runs along the left of the house, as viewed from the front. A clearly marked path leads to the front door. *See* Pl.'s Exs. 22, 26.[3] There is no other marked path to the Carmans' house. A stone parking area is located on the left side of the house, *see* Pl.'s Ex. 25, and a shed and carport, which the parties refer to as a "garage," are located in the Carmans' backyard.

The Carmans also have a back deck that adjoins their kitchen area. *See* Pl.'s Ex. 18, 21. Two sets of stairs lead up to the deck, and a sliding glass door by the deck leads to the kitchen. *See id.* However, the Carmans testified that visitors use the front entrance when they come to visit.

When the troopers arrived at the Carmans' home, Andrew and Karen Carman were sitting in their kitchen with Karen Carman's sister; they were the only people present at the home. Because there was no parking in front of the Carmans' house, the troopers drove down the side street, passed numerous cars parked along the side of the Carmans' house, and parked their cars at the first available spot, at "the far rear of the property." App. 79. The troopers then got out of their cars, entered the Carmans' backyard, and headed toward the garage. Carroll purportedly took this route because he saw a light on in the garage and thought someone might be there. He "poked [his] head in" the garage "and said, Pennsylvania State Police," but "there was nobody in there." App. 80.

Carroll thought the sliding door attached to the back deck of the house "looked like a customary entryway." App. 92. Thus, after searching the garage

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[3] For ease of reference, various photographs introduced at trial are appended to this Opinion.

and finding no one there, he and Roberts continued walking through the backyard and proceeded to the back deck. As the troopers stepped onto the deck, Andrew Carman came out of the house. Carman was belligerent and aggressively approached the troopers, asking, "Who the fuck are you?" App. 63, 80-81. Given Carman's behavior, Carroll thought the man he was speaking with might be Zita. Carroll informed him that they were looking for Zita and asked Carman to identify himself. Carman refused to divulge his identity, made a quick turn away from the troopers, and appeared to reach for his waist, bringing his hands outside the troopers' view. Still unsure of Carman's identity, Carroll feared that Carman might be reaching for a weapon. He, therefore, momentarily grabbed Carman's right arm. Upon seeing that Carman was unarmed, he let go. Carman twisted and fell off the deck.

Karen Carman subsequently exited her house and came onto the deck with her sister. The two women were screaming when they approached Roberts. Consequently, Roberts ordered them to stand back and drew his Taser. Karen Carman asked the troopers what was going on, and Carroll explained that they were looking for Zita and asked her if they could search the house for him. She gave her consent and everyone went into the house.

The troopers searched the Carmans' house and did not find Zita. The stolen vehicle was not at the Carmans' residence, and the Carmans were not charged with any crimes.

B.

Andrew and Karen Carman brought this case pursuant to 42 U.S.C. § 1983, alleging that Carroll

violated their Fourth Amendment rights. In particular, the Carmans' two-count complaint alleged that Carroll's warrantless entry into their backyard, garage, back deck, and home constituted an unlawful search and that Carroll unreasonably seized Andrew Carman. Before trial, the Carmans advised the District Court of the Supreme Court's recent decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), and asserted that they should be entitled to a directed verdict at trial based on that case. They also submitted a proposed jury instruction regarding the "knock and talk" exception to the warrant requirement; their instruction cited heavily to *Jardines*.

The District Court conducted a two-day jury trial. After opening arguments, the Carmans moved for a directed verdict, effectively a judgment as a matter of law, on their unlawful entry claim.[4] At the close of Carroll's testimony, the Carmans renewed their request for judgment as a matter of law on the unlawful entry claim and also moved for judgment as a matter of law on their unreasonable seizure claim. Carroll moved for judgment as a matter of law on the Carmans' unlawful entry claim on the ground that he was entitled to qualified immunity. The District Court denied all of the motions without explanation.

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[4] As a result of the 1991 Amendment to Federal Rule of Civil Procedure 50(a), the term "directed verdict" has been abandoned and replaced with the term "judgment as a matter of law." Therefore, we construe the parties' motions for a directed verdict as motions for judgment as a matter of law under Rule 50(a). *See Wittekamp v. Gulf & W., Inc.*, 991 F.2d 1137, 1141 n.6 (3d Cir. 1993) ("The parties' briefs have referred to the motion as seeking a directed verdict, but the motion more appropriately is termed a motion for judgment as a matter of law because the 1991 revision to Rule 50(a) abandoned the term 'directed verdict.' ").

The District Court also rejected the Carmans' proposed jury instruction regarding the "knock and talk" exception. Over the Carmans' objections, the District Court charged the jury with a different instruction; the District Court's instruction cited language from our decision in *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), but did not cite *Jardines*.

Ultimately, the jury returned a verdict finding in Carroll's favor on both claims. Judgment was entered on April 10, 2013. This appeal followed.[5]

II.

On appeal, the Carmans argue that the District Court erred in denying their motions for judgment as a matter of law on their Fourth Amendment unlawful entry and unreasonable seizure claims. The Carmans also argue that the District Court provided an erroneous jury instruction regarding the "knock and talk" exception to the warrant requirement.

A.

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[5] We have jurisdiction over this case under 28 U.S.C. § 1291. We exercise plenary review over a district court's denial of judgment as a matter of law. *Moyer v. United Dominion Indus., Inc.*, 473 F.3d 532, 545 n.8 (3d Cir. 2007). Such a motion "should be granted only if, viewing the evidence in the light most favorable to the nonmoving party, there is no question of material fact for the jury and any verdict other than the one directed would be erroneous under the governing law." *Brownstein v. Lindsay*, 742 F.3d 55, 63 (3d Cir. 2014) (quoting *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996)) (internal quotation marks omitted).

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Under the Fourth Amendment, a search occurs when the government: (1) physically intrudes on constitutionally protected areas, *see Jardines*, 133 S. Ct. at 1414, or (2) invades "a subjective expectation of privacy that society recognizes as reasonable," *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)). *Accord Jardines*, 133 S. Ct. at 1417 ("The *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment . . . " (quoting *United States v. Jones*, 132 S. Ct. 945, 952 (2012))).

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (internal quotation marks omitted). This rule is "subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz*, 389 U.S. at 357). We "regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.' " *Jardines*, 133 S. Ct. at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)); *see also Marasco*, 318 F.3d at 518 ("Fourth Amendment protections extend not only to a person's home, but also to the curtilage surrounding the property."). Thus, we presume a warrantless search of curtilage to be unreasonable.

B.

From the moment that Carroll entered the Carmans' backyard, he was in the curtilage surrounding their house. It is undisputed that Carroll entered into the Carmans' curtilage without a warrant, without consent, and without exigent circumstances. Carroll argues that he nonetheless did not violate the Fourth Amendment because he entered the Carmans' property while conducting a "knock and talk." As he correctly points out, a "knock and talk" encounter is a permitted exception to the warrant requirement. Accordingly, we assess whether this exception applies to this case.

Under the "knock and talk" exception, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " *Jardines*, 133 S. Ct. at 1416 (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)); *see also Marasco*, 318 F.3d at 519 ("Officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may."). Needless to say, government officers cannot benefit from the "knock and talk" exception simply because they knock on a door. For purposes of the Fourth Amendment, a "knock and talk" is a brief, consensual encounter that begins at the entrance used by visitors, which in most circumstances is the front door.[6] A "knock and talk" encounter must satisfy three requirements.

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[6] We recognize that there may be some instances in which the front door is not the entrance used by visitors. Despite Carroll's argument to the contrary, this is not one such instance.

First, a police officer, like any visitor, must "knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *See Jardines*, 133 S. Ct. at 1415.

Second, the purpose of a "knock and talk" must be to interview the occupants of a home, not to conduct a search. *See id.* at 1416 n.4 ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*. . . . But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search."); *Marasco*, 318 F.3d at 520 (noting that the "knock and talk" exception may apply "[w]here officers are pursuing a lawful objective, *unconnected to any search* for the fruits and instrumentalities of criminal activity" (emphasis added)). In *Jardines*, for example, the officer's entry into the curtilage violated the Fourth Amendment because his "behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do." 133 S. Ct. at 1417.

Third, a "knock and talk" encounter must begin at the front door because that is where police officers, like any other visitors, have an implied invitation to go. It is well settled that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Id.* at 1415 (quoting *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)) (internal quotation marks omitted). This implied invitation "typically permits the visitor to approach the home by the front path . . . . Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id.* at 1415.

Although officers have a right to knock at the front door while executing a "knock and talk," this right does not "necessarily extend[] to the officers the right to enter [elsewhere] into the curtilage." *Marasco*, 318 F.3d at 520. In *Marasco*, we recognized that an officer's entry into other parts of the curtilage "*after not receiving an answer at the front door* might be reasonable" in limited situations. *Id.* (emphasis added). However, we rejected the "sweeping proposition" that "officers may proceed to the back of a home when they do not receive an answer at the front door any time they have a legitimate purpose for approaching the house in the first place." *Id.* at 519-20.

In this case, Carroll cannot avail himself of the "knock and talk" exception to the warrant requirement because he entered the back of the Carmans' property without approaching the front door first. Carroll contends that the layout of the Carmans' property "made the back door the most expedient and direct access to the house from where the troopers had to park." Carroll Br. at 18. While it may have been more convenient for the troopers to cut through the backyard and knock on the back door, the Fourth Amendment is not grounded in expediency. The "knock and talk" exception requires that police officers begin their encounter at the front door, where they have an implied invitation to go. This exception does not license officers to bypass the front door and enter other parts of the curtilage based on where they park their cars. Because Carroll did not knock on the Carmans' front door, but instead proceeded directly through the back of their property, his intrusion cannot be justified as a "knock and talk." Accordingly, Carroll's warrantless entry into the Carmans'

curtilage violated the Fourth Amendment as a matter of law.

C.

Under the qualified immunity doctrine, government officials are shielded from civil liability for conduct that does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982)). Therefore, in determining whether Carroll is entitled to qualified immunity for violating the Carmans' Fourth Amendment rights, we must decide whether these rights were "clearly established at the time of [Carroll's] alleged misconduct. Qualified immunity is applicable unless [his] conduct violated a clearly established constitutional right." *See id.* at 232 (internal citations and quotation marks omitted).

"An individual's Fourth Amendment interest in the curtilage of his home has been well settled for over a century." *Marasco*, 318 F.3d at 521 n.13. Over a decade ago, in *Marasco*, we made clear that an officer's right to knock at the front door while conducting a "knock and talk" does not carry a concomitant right to enter other parts of the curtilage. We established that "entry into the curtilage *after not receiving an answer at the front door* might be" justified under the "knock and talk" exception in limited situations. *Id.* at 520 (emphasis added). Because Carroll bypassed the front door completely, he exceeded the boundaries of the "knock and talk" exception. Based on *Marasco*, which pre-dated Carroll's conduct, it was clearly established that the

trooper's warrantless entry into the Carmans' curtilage violated their Fourth Amendment rights.

Therefore, we reverse the District Court's denial of the Carmans' motion for judgment as a matter of law with respect to their unlawful entry claim.[7]

D.

We next address Andrew Carman's unreasonable seizure claim. It is undisputed that Carroll seized Carman when he grabbed Carman's arm. Thus, the relevant question is whether there was a "minimum quantum of evidence from which the jury could have rationally reached [its] verdict" that the seizure was reasonable. *See Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 653 (3d Cir. 1993) (internal quotation marks omitted).

"[S]ubject only to a few well-defined exceptions, warrantless . . seizures are *per se* unreasonable under the Fourth Amendment." *United States v. Williams*, 413 F.3d 347, 351 (3d Cir. 2005) (citing *United States v. Ross*, 466 U.S. 798, 824-25 (1982)). However, "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)) (internal quotation marks omitted); *see also Adams v. Williams*, 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily

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[7] Because we hold that Carroll's warrantless entry violated the Fourth Amendment, entitling the Carmans to judgment as a matter of law, we do not address the Carmans' challenge to the District Court's jury instructions.

while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."). This right to conduct an "investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Based on the facts presented at trial, there was a "minimum quantum of evidence" from which a jury could rationally conclude that Carroll's conduct was reasonable. Carroll testified that he was unsure of Carman's identity at the time, did not know whether he was dealing with Zita, and did not know why this unidentified man approached him and Roberts with such hostility. Thus, a jury could rationally find that Carroll had reasonable suspicion to momentarily question Carman to ascertain his identity. Moreover, based on Carroll's testimony that he thought Carman might be an armed car thief and feared that the man was reaching for a weapon, a jury could rationally find that Carroll was justified in momentarily grabbing Carman's arm to effectuate a stop. Because the facts provide a minimum amount of evidence to support the jury's finding that Carroll acted reasonably, we affirm the jury verdict on the unreasonable seizure claim.

III.

For the foregoing reasons, we affirm in part and reverse in part the judgment of the District Court. As to the unlawful entry claim, we reverse the District Court's denial of the Carmans' motion for judgment as a matter of law. We remand the case with the direction that judgment be entered in the Carmans' favor and that a new trial be ordered with respect to damages. As to the unreasonable seizure claim, we

affirm the jury verdict and the District Court's denial of judgment as a matter of law.

EXHIBITS TO OPINION

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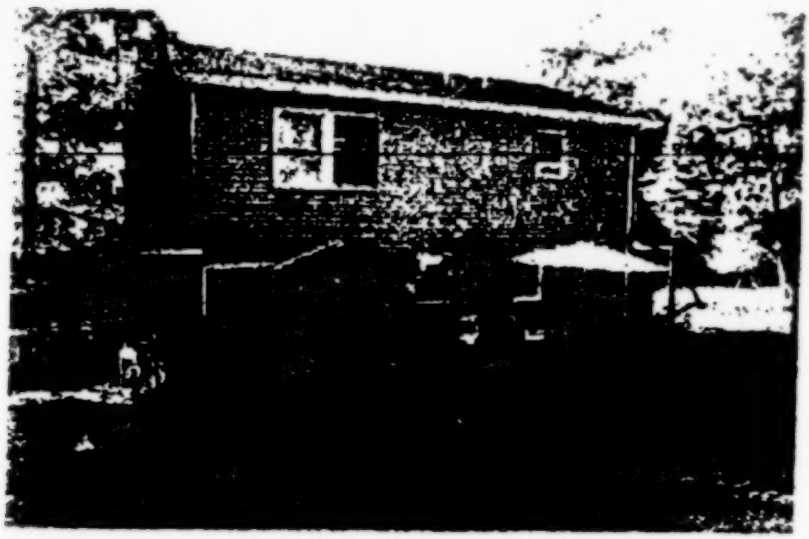

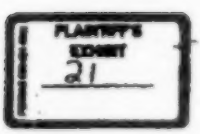
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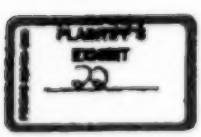
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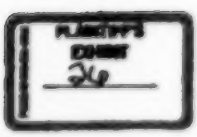

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANDREW CARMAN and KAREN CARMAN, Plaintiffs	:	**No. 3:10cv1013**
	:	**(Judge Munley)**
v.	:	
JEREMY CARROLL, Defendant	:	

MEMORANDUM

Before the court are the parties' cross-motions for summary judgment. (Docs. 20, 24). Having been briefed, the motions are ripe for disposition.

Background

Plaintiffs Andrew and Karen Carman (hereafter "plaintiffs") resided at101 Raspberry Path, Dingman's Ferry, Pennsylvania. (Doc. 21, Pls. Statem. of Mat. Facts (hereafter "Pls. Facts") ¶ 1). On July 3, 2009,plaintiffs were sitting in their kitchen with Jacqueline Vergottini, Karen Carman's sister. (*Id.* ¶ 4). Ms. Vergottini glanced out the window and noticed police officers near plaintiffs' shed.[1] (*Id.* ¶ 25). Mr. Carman also looked out the window and saw two officers, Pennsylvania State Troopers Defendant Jeremy Carroll and Brian Roberts. (*Id.* ¶ 26).

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[1] Both parties refer to the structure in plaintiffs' back yard as either a shed or garage.

The troopers were dispatched to the Carman residence to look for an individual named Michael Zita, a felon parolee who had stolen a 2002Chrysler Convertible and two loaded firearms. (*Id.* ¶¶ 10, 13; Doc. 25, Def. Statem. of Mat. Facts (hereafter "Def. Facts") ¶ 1). The police believed that Zita may have been on his way, to or was at, the Carman residence.(Def. Facts ¶ 2). The troopers did not have a search warrant for Carmans' property or an arrest warrant for Zita. (Pls. Facts ¶ 22). Upon arriving at the Carman residence, the officers looked to see if the stolen vehicle was parked outside their home. (Def. Facts ¶¶ 1, 3). It was not. (*Id.*) The Carmans' home is located on a corner property with a road in front of and on the left side of their house. (Doc. 26, Ex. 4, Def. Carroll Tr. at 17).Defendant and Trooper Roberts parked their respective cars on the side of the property and proceeded to walked across plaintiffs' back yard where there was an open garage. (Def. Facts ¶¶ 3-4). Defendant described the garage as a structure open in the front, back and partially on the sides that had several cars in it. (*Id.* ¶ 4; Doc. 26, Def. Ex. 6). Without going inside, the Troopers looked into the garage, but did not see the stolen vehicle.[2] (*Id.* ¶ 4). They then proceeded up to the back deck attached to the Carman residence. (*Id.* ¶ 6). Mr. Carman walked onto the deck to see what the officers wanted. The parties largely dispute the events that occurred after Mr. Carman went outside.

Plaintiffs claim that Mr. Carman asked if he could help the officers.(Pls. Facts ¶ 28). The Troopers asked Mr. Carman, "Where is he?" referencing the whereabouts of Michael Zita. (*Id.* ¶ 29). After Mr.

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[2] Based on the facts, it appears that the plaintiffs only noticed the officers after they looked into the garage.

Carman learned who they were looking for, he explained that he went to school with Michael Zita twenty-five or thirty years ago. (*Id.* ¶ 32). Defendant asked him if he could take a look around and Mr. Carman refused. (*Id.* ¶ 33-34).After Mr. Carman told defendant that Michael Zita was not on the property, defendant told him to sit down. (*Id.* ¶ 40). Mr. Carman told the officers he did not have to sit down. (*Id.* ¶ 41). The officers threatened to arrest Mr. Carman. (*Id.* ¶ 42). Mr. Carman asked if they had a search warrant, which they did not. (*Id.* ¶¶ 44-46). He told the officers that if they wanted to search his home they would need a search warrant. (*Id.* ¶ 46). Mr. Carman started to walk back to his home when Defendant Carroll pushed him up against the sliding glass door and tackled him down the stairs, off the deck. (*Id.* ¶¶ 49-50).Mrs. Carman and Ms. Vergottini said that they saw Defendant Carroll slam Mr. Carman against the sliding glass door. (*Id.* ¶ 51). When they went outside Defendant Carroll was sitting on top of Mr. Carman and pushing his head into the ground. (*Id.* ¶¶ 53-54). The women yelled at defendant to get off Mr. Carman. (*Id.* ¶ 58). Mr. Carman yelled to call 911.(*Id.* ¶ 61). At some point, Ms. Vergottini did call 911. (*Id.* ¶ 62). The 911operator informed her that police were already at the residence, however Ms. Vergottini explained that they were beating up her brother-in-law. (*Id.*¶ 64). When Mr. Carman got up he had blood on his face and his shoulder was injured. (*Id.* ¶ 60).

Defendant provides a different account of what happened after Mr. Carman went outside onto the deck. Defendant explained that both he and Trooper Roberts went onto the back deck of the house and were going to knock on the back door. (Def. Facts ¶ 6). Mr. Carman exited the house and said "Who the fuck are you?" (Doc. 29, Def. Resp. to Pls. Statem. of Mat.

Facts ¶ 28). Defendant explained who the troopers were and that they were looking for Michael Zita. (*Id.* ¶ 29). Mr. Carman refused to identify himself and was belligerent. (*Id.* ¶ 49). When Mr. Carman turned to go back into the house, he put his hands "down his front" and out of view of the officers. (Doc. 28, Def. Br. in Supp. of Def. Mot. for Partial Summ. J.at 2). Defendant then grabbed Mr. Carman by the shoulder/forearm and Mr. Carman suddenly whirled around, lost his balance and fell down two steps onto the ground. (*Id.*).

Both parties agree that Mrs. Carman and Ms. Vergottini were yelling at the officers and Trooper Roberts told them to back off or he would use his taser. (Pls. Facts ¶ 59; Def. Facts ¶ 10). After Mr. Carman got up, defendant explains that everyone was standing on the deck talking. (Def. Facts ¶¶ 11-12). The officers informed the plaintiffs and Ms. Vergottini that they were looking for Michael Zita. (Pls. Facts ¶ 66; Def. Facts ¶ 12). Mrs. Carman explained to Defendant Carroll that she had not seen Michael Zita for ten years and he was not on the property. (Pls. Facts ¶¶ 67-68).Plaintiffs claim defendant then told Mrs. Carman that he wanted to search their home. (*Id.* ¶ 69). After learning why the officers were there, defendant asserts that Mrs. Carman invited everyone inside the house.(Def. Facts ¶¶ 12, 13; Doc. 32, Pls. Reply Br. at 9).

Mrs. Carman claims that she felt compelled to give the officers permission to search their home. (Pls. Facts ¶ 70). She explained that she allowed the search because "[b]asically we weren't hiding anything. And I just wanted them to leave at that point." (Def. Facts ¶ 14). The officers searched the house with their guns drawn. (Pls. Facts ¶¶ 72-73).Michael Zita was not in the house. (*Id.* ¶ 74). After the search, the officers

spoke with plaintiffs and Ms. Vergottini in plaintiffs' kitchen. (*Id.* ¶ 75). The plaintiffs were not charged with any crimes. (*Id.* ¶ 76).

On May 11, 2010, plaintiffs filed a complaint against Defendant Jeremy Carroll pursuant to 42 U.S.C. § 1983. (Doc. 1). Count I of the complaint alleges that defendant's conduct constituted illegal entry on to their property and into their home in violation of the Fourth and Fourteenth Amendments. (*Id.*) Count II of the complaint alleges that defendant's conduct, including his use of force, constituted an unreasonable seizure of Plaintiff Andrew Carman in violation of the Fourth and Fourteenth Amendments. (*Id.*) Defendant filed an answer on July 13, 2010. At the close of discovery both parties moved for summary judgment.(Docs. 20, 24). Plaintiffs moved for summary judgment on all of their claims. Defendant moved for partial summary judgment on Count I of the complaint alleging illegal entry.

Jurisdiction

As this case is brought pursuant to 42 U.S.C. § 1983 for constitutional violations, we have jurisdiction under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

Legal Standard

Before the court are the plaintiffs' and defendant's motions for summary judgment. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Knabe v. Boury*, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (citing FED. R. CIV. P. 56(c)). "[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949(3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248. A fact is material if it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex v. Catrett*, 477U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324.

Discussion

The parties filed cross-motions for summary judgment. Plaintiffs bring both counts in the complaint pursuant to 42 U.S.C. § 1983 (hereafter "Section 1983"). Section 1983 does not, by its own terms, create substantive rights. Rather, it provides remedies for deprivations of rights established elsewhere in the Constitution or federal law. *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). In pertinent part, Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Thus, to establish a claim under Section 1983, two criteria must be met. First, the conduct complained of must have been committed by a person acting under color of state law. Second, the conduct must deprive the plaintiff of rights secured under the Constitution or federal law. *Sameric Corp. of Del., Inc. v. City of Phila.*, 142 F.3d 582, 590 (3d Cir. 1998).

In the instant case, the parties do not dispute whether the defendant acted under color of state law during the alleged violations. They only move for summary judgment as to whether there was an illegal entry and whether defendant unreasonably seized Mr. Carman with unreasonable force. We will address the two counts in the complaint, in turn.

A. Illegal Entry

Both parties move for summary judgment on plaintiffs' claim that defendant illegally searched plaintiffs' garage and home. Plaintiffs also argue that defendant illegally entered on to the curtilage of their property. The court will address each area of plaintiffs' property–the curtilage, the garage and the house–separately.

1. Curtilage

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. It is well-established that the Fourth Amendment protections extend not only to a person's home, but also to the curtilage surrounding the property. *United States v. Dunn*, 480 U.S. 294, 301 (1987); *Estate of Smith v. Marasco*, 318 F.3d 497, 518 (3dCir. 2003). "Curtilage" is defined as "the area immediately adjacent to[one's] home in which he has a legitimate expectation of privacy." *United States v. Bansal*, 663 F.3d 634, 663 (3d Cir. 2011) (citations omitted).

In the instant case, plaintiffs argue that they are entitled to summary judgment because defendant's entry onto the curtilage of their property violated their Fourth Amendment rights. Defendant does not dispute that the area that he and Trooper Roberts entered was "curtilage" protected under the Fourth Amendment. He contends that under the investigative technique, "knock and talk," the officers were allowed to knock on a resident's door or otherwise approach the residence to speak with the inhabitants.

The Third Circuit has adopted the "knock and talk" exception to the warrant requirement. *Estate of Smith*, 318 F.3d at 521. This technique provides that "officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may." *Id.* at 519. Officers should restrict their movements to walkways, driveways, porches and places where visitors could be expected to go. *Id.* (quoting Wayne R. LaFave, *1 Search and Seizure: A Treatise on the Fourth Amendment* § 2.3(f) (3d ed. & Supp.2003)). Any observations made by the officers during their lawful entry under this technique do not violate the Fourth Amendment. *Id.* However,"[t]he flip side of this is that citizens are free not to cooperate with a 'knock and talk' investigation, and, absent a warrant, police cannot detain them, demand entry into their homes, or otherwise compel their cooperation unless an exception to the warrant requirement applies." *United States v. Butler*, 405 F. App'x 652, 656-57 (3d Cir. 2010).

The "knock and talk" procedure is appropriate in a limited number of circumstances where the police did not observe any criminal activity before approaching the dwelling and did not know that the occupants were armed. *United States v. Coles*, 437 F.3d 361, 368 n.12 (quoting *United States v. Jones* 239 F.3d 716, 721 (3d Cir. 2001)). The "knock and talk" strategy is used when officers seek to obtain the inhabitant's consent to search or when officers reasonably suspect criminal activity. *Jones*, 239 F.3d at 720; *see also United States v. Claus*, No. 11-1412, 2012 WL 120081, at *3 (3d Cir. Jan. 17, 2012) (explaining that the purposes of the "knock and talk" procedure is to speak with occupants or ask for consent to search).

Some courts have extended this investigative tactic beyond the front door of the home and to other areas of the property under a limited number of circumstances. These situations often involve a failed attempt to either approach the front door because of an obstruction or a failed attempt to receive an answer at the front door. *See Estate of Smith*, 318 F.3d at 519 (gathering cases where courts found it was lawful for officers to move away from the front door). The Third Circuit explained,

> Where officers are pursuing a lawful objective, unconnected to any search for the fruits and instrumentalities of criminal activity, their entry into the curtilage after not receiving an answer at the front door might be reasonable as entry into the curtilage may provide the only practicable way of attempting to contact the resident . . . where the front door was inaccessible. Similarly, officers reasonably may believe, based on the facts available to them, that the person they seek to interview may be located elsewhere on property within the curtilage . . . and . an officer's brief entry into the curtilage to test this belief might be justified.

Id. at 520; *see also United States v. Hammett*, 236 F.3d 1054, 1060 (9th Cir. 2001) ("an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence.").

In the instant case, defendant contends that he was lawfully present on plaintiffs' property attempting a "knock and talk." Defendant and Trooper Roberts approached plaintiffs' residence to investigate the whereabouts of Michael Zita, an armed felon. Plaintiffs' back yard was not fenced in, and there was no indication that it was closed off from the general public. Plaintiffs assert that the

defendant did not enter the property through a route which any visitor or delivery person would use or into an area where the general public had a right to be. Defendant accessed the back yard of the property and went onto the back deck of their home.

The cases addressing lawful "knock and talk" procedures involved police officers approaching, or at least attempting to approach, the front door of a person's home. *See Estate of Smith*, 318 F.3d at 519. However, in adopting the "knock and talk" procedure in Estate of Smith, the Third Circuit explained that where an officer reasonably believes, based on the facts available to him, that the occupant the officer wishes to speak with may be located elsewhere on the property within the curtilage, they may enter into the curtilage to test that belief. *Id.* at 520. Based on defendant's observations prior to entering the curtilage and subsequent actions, we find that the there exists a question of whether the defendant's actions were reasonable in attempting a "knock and talk." We find that this question would be appropriately determined by the jury.

During defendant's deposition, he explained that he and Trooper Roberts "parked our patrol vehicles and went to the rear of the residence where we parked. We had to park at the rear because there were [sic] cars all along the side. Exited our patrol vehicles and entered the yard." (Doc. 30, Ex. D., Trooper Carroll's Tr. at 16). He could not remember if he and Trooper Roberts parked their cars on the side of the road or if there was a driveway. (*Id.* at 18). Defendant explained "[t]here was an open garage or shed there with some sort of light on, looked like somebody was in it. We were just going to ask them if they saw Michael Zita." (*Id.* at 17).They walked to the garage and defendant "just peeked in, said

Pennsylvania State Police." (*Id.* at 19). He did not receive a response and determined no one was there. (*Id.*) The troopers then turned to go towards the rear of the residence, walking through the Carmans' back yard and onto the deck.[3]

We find that in light of these circumstances, it may have been reasonable for defendant to go into plaintiffs' back yard after he thought someone might be present on the curtilage of the property, rather than going to the front door of the residence. It also may have been justified for defendant to turn from the garage and proceed to the nearest entrance of plaintiffs' residence, the back door, after the defendant looked into the garage and did not see anyone. While plaintiffs deny that the officers entered the property by a route which a visitor or delivery person would use, we simply do not know enough about the property to make such a conclusion that defendant's actions were unreasonable and thus unlawful. Therefore, we will deny plaintiffs' motion for summary judgment as to defendant's entrance onto the curtilage in violation of the Fourth Amendment.

2. Garage

Both parties move for summary judgment on plaintiffs' claim that defendant illegally searched plaintiffs' garage. The parties do not dispute the facts as to how defendant came on to plaintiffs' property or his observation of the inside of the garage. Defendant

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[3] At Trooper Roberts' deposition, he recalled, "The [garage] doors were open on it and a light on. Went to the opening of the garage, looked in, I didn't see anybody in there." (Doc. 30, Ex. E, Trooper Robert's Tr. at 9).

again relies on the "knock and talk" exception to justify his presence in plaintiffs' back yard. He essentially argues that the inside of the garage was in his plain view.

A police officer may make a warrantless observation of objects in a home's curtilage within his plain view. *Dunn*, 480 U.S. at 304. The "plain view" exception to the warrant requirement is usually applied in situations where the police officer did not violate the Fourth Amendment in arriving at the place where evidence was viewed and the evidence was immediately apparent. *See United States v. Stabile*, 633 F.3d 219, 241 (3d Cir. 2011).In *Minnesota v. Dickerson*, the Supreme Court explained,

> Under that [plain view] doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.

508 U.S. 366, 375 (1993).

In the instant case, defendant explains that he and Trooper Roberts were legitimately on the property investigating the whereabouts of Michael Zita. He was attempting to conduct a "knock and talk" and did not violate the Fourth Amendment by observing the inside of the garage while lawfully present on the property. Defendant claims that these observations were in his plain view and therefore did not constitute a search.

Pursuant to our finding above, defendant's use of the "knock and talk" technique involves a question as to whether defendant reasonably believed, based on the facts, that a person he wished to speak with was located elsewhere on the property within the curtilage and if it was reasonable to enter the curtilage to test

that belief. As the application of the plain view doctrine rests on that preceding question of whether defendant was lawfully present, we will deny the parties' motion for summary judgment as to defendant's observations of the inside of the garage.

3. House

Both parties move for summary judgment on plaintiffs' claim that defendant did not obtain valid consent before searching the plaintiffs' home. Plaintiffs argue Mrs. Carman's consent was not freely or voluntarily obtained. Defendant contends Mrs. Carman invited the troopers into the house and unequivocally granted permission to search the house. Because the parties largely dispute the events and circumstances surrounding Mrs. Carman's consent, we will deny the parties' motions for summary judgment.

It is well-settled that the government may conduct a search without a warrant or probable cause if an individual consents to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973). "[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. In such an examination, the court should consider coercive questions and the possible vulnerable subjective state of person who consents. *Id.* at 229. The court must also consider the setting in which consent was obtained, including verbal and non-verbal actions. *United States v. Price*, 558 F.3d 270, 278 (3d Cir. 2009) (quoting *United States v. Givan*, 320 F.3d 452, 459 (3d Cir. 2003)).Attention should be given to the consenting individual's age, intelligence and

educational background. *Schneckloth*, 412 U.S. at 226. Knowledge of one's right to refuse consent to search is but one factor to be taken into account and is not dispositive of the issue of valid consent. *United States v. Kim*, 27 F.3d 947, 955 (3d Cir. 1994).

In the instant case, the parties dispute the facts the led up to Mrs. Carman's consent to search plaintiffs' home.[4] In determining whether the consent was voluntarily, we must examine the totality of the circumstances. The setting in which Mrs. Carman granted the officers consent was after the commotion between the officers, plaintiffs and Ms. Verrgottini. Both plaintiffs and defendant cite to these portions of Mrs. Carman's testimony:

> Q. Who was it that indicated to the troopers they could go inside and search the house?
>
> A. I did.
>
> Q. Why did you allow them to do that?
>
> A. Basically, we weren't hiding anything. And I just wanted them to leave at that point.

(Doc. 26, Ex. A, Karen Carman Tr. at 36).

> Q. Prior to the officer going in your house to search, was everything calmed down and basically under control?
>
> A. I wouldn't say calmed down but I said — in my mind, if I let them go in and search for [Michael Zita] everything — like I said, would just leave. I kind of felt like I had to do that, you know, I had to let them go in or nothing was going to calm down basically.

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[4] Defendant discusses "apparent authority" to grant permission to search the premises. (Doc. 31, Def. Br. in Supp. at 7-8). However, authority to grant consent is not at issue in this case. Plaintiffs' do not dispute that Mrs. Carman had the authority, but that her consent was not freely obtained.

(*Id.* at 47- 48).

While the parties agree to Mrs. Carman's description of how she provided consent, they disagree as to the events that occurred prior to Mrs. Carman's granting such permission. Plaintiffs claim that Mrs. Carman saw defendant push Mr. Carman up against the sliding glass door. (Pls. Facts¶ 51). However, defendant contends that defendant went to grab Mr. Carman and he ended up off of the deck and on the ground. (Def. Facts ¶8). Plaintiffs claim defendant was sitting on top of Mr. Carman on the ground and defendant contends he was standing next to Mr. Carman telling him to get up. (Pls. Facts ¶ 54; Def. Br. in Supp. of Partial Summ. J.at 2). The parties also somewhat dispute the nature and extent of Mr. Carman's injuries.

The parties' accounts also differ as to what prompted Mrs. Carman's consent to search. Plaintiffs argue that defendant said he wanted to search the house. (Pls. Facts ¶ 69). Defendant argues that after Mr. Carman gained control of himself and everyone was on the back deck talking, Mrs. Carman invited the troopers inside the house. (Def. Facts ¶¶12-13). The officers did not threaten Mrs. Carman and Mr. Carman did not object to Mrs. Carman granting the officers permission to search. Defendant also indicates that Mrs. Carman stated during her deposition that she did not remember if the officers asked her to search her house.(Doc. 26, Ex. A. Karen Carman's Tr. at 49). The parties also disagree on whether the situation had "calmed down," somehow creating a break in time from the confusion in plaintiffs' initial encounter with the officers to the plaintiffs' understanding of why the officers were at the residence.

As this court considers the totality of the circumstances to determine whether consent was freely and voluntarily given, there still exists questions of fact as to whether there was a coercive environment that would have made Mrs. Carman's consent involuntary. Therefore, we will deny the parties' motions for summary judgment.

B. Unreasonable Seizure and Force

Plaintiffs move for summary judgment on Count II of the complaint alleging unreasonable seizure and unreasonable force with regard to Mr. Carman. We find that these claims involve disputed fact and summary judgment is not appropriate.

Under the Fourth Amendment, an individual is "seized" when an officer restrains a person by either means of physical force or a show of authority, thereby restraining their liberty. *Terry v. Ohio*, 392 U.S. 1, 19n.16 (1968). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991). "When a police officer has a 'reasonable, articulable suspicion that criminal activity is afoot,' he or she may conduct a 'brief, investigatory stop.' " *United States v. Whitfield*, 634 F.3d 741, 744 (3d Cir. 2010) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). "Reasonable suspicion" requires less than probable cause, but must rise to a minimal level of objective justification for the stop, considered under the totality of the circumstances. *Id.*

"The use of excessive force is itself an unlawful 'seizure' under the Fourth Amendment." *Couden v.*

Duffy, 446 F.3d 483, 496 (3d Cir. 2006) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). The use of excessive force during a seizure should be analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham*, 490 U.S. at 395. Such an inquiry "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.*

The Supreme Court enumerated a number of factors to use in making an objective determination of whether the force was reasonable, including severity of the crime, whether the suspect poses an immediate threat to the safety of the officer or others and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396.The Third Circuit has also articulated additional factors including, "the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time." *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997).

In the present case, the parties disagree as to the facts regarding the alleged seizure and force used by defendant on Mr. Carman. Plaintiffs claim that when Mr. Carman exited his residence he did not pose an immediate threat to the safety of the officers and was not fleeing or resisting an arrest. Plaintiffs claim that Mr. Carman answered all of defendant's questions and explained that Michael Zita was not on the property. Mr. Carman told the officers that they would need a search warrant and turned to return to his home. Defendant grabbed Mr. Carman's arm and tackled him off of the deck. After Mr. Carman was able to get up, defendant continued to ask him

questions. Therefore, plaintiffs argue that Mr. Carman was not free to leave and was thus illegally seized.

To the contrary, defendant claims that when the officers went up onto the back deck to knock on the door, Mr. Carman exited the residence, was belligerent and refused to identify himself. Mr. Carman then turned around to go back to the house and he put his hands "down his front" and out of view of the officers behind him. Defendant then grabbed Mr. Carman by the shoulder and Mr. Carman whirled around, lost his balance and fell down two steps off of the deck.

Because of the disputed facts, we will deny plaintiffs' motion for summary judgment as it relates to the unreasonable seizure and unreasonable force.

Conclusion

For the reasons stated above, the plaintiffs' motion for summary judgment (Doc. 20) and defendant's motion for partial summary judgment (Doc. 24) will be denied. An appropriate order follows.

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 27 2014
OFFICE OF THE CLERK

No. 14-212

In the Supreme Court of the United States

JEREMY CARROLL,

Petitioner,

v.

ANDREW CARMAN and KAREN CARMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Whether the Third Circuit correctly held that a police officer without a warrant who wished to engage in a "knock and talk" violated the Fourth Amendment when he bypassed the front path, front porch and front door, and instead walked through a backyard without any pathway, and climbed the steps onto a back deck attached to a house?

2. Whether the Third Circuit announced a "categorical" rule, or simply discussed and applied pre-existing law that police like all others may approach a house in the same manner as any other uninvited visitor?

3. Was the law applied by the Third Circuit clearly established at the time of the underlying events?

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INTRODUCTION

The entire premise of Petitioner Jeremy Carroll's claim that this Court should grant *certiorari* is false. Petitioner Carroll repeatedly but inaccurately states that the Third Circuit created a "categorical" or "rigid" rule that "knock and talk" encounters between the police and a citizen must always begin at the front door. The problem with Carroll's premise is that it is false. Under no reasonable reading of the Third Circuit's opinion is there any such categorical rule. In fact, the Third Circuit went out of its way several times to state that there may be other circumstances or other factual scenarios in which a knock and talk need not begin at the front door. Carroll's petition for *certiorari* relies on a common litigation tactic: if one states a position frequently and emphatically, then fiction becomes fact.

Carroll's other false premise, repeated early and often, is that the jury "found that the back door reasonably appeared to be the customary entry for visitors arriving at the [respondents Carmans'] house by car. . . ." Pet. Brief, at 1-2. Notably, Carroll does not refer to any part of the record for this premise, as he cannot. There simply was no such jury finding, as no such question was put to the jury.

The Third Circuit's opinion in this case was clear, correct and in agreement with the opinions of its sister circuits and with this Court's cases. The court held that on the objective, undisputed facts in this case, as revealed by both the testimony and the photographs which were part of the evidence and which the Court of Appeals appended to its opinion, the police officer who wished to conduct a knock and talk should have gone

up the clearly visible front path to the front door and knocked on the door. Instead, the officer walked across a backyard with no path, climbed stairs to a deck which was attached to the back of the house and which was not visible from the street. The opinion was well written, but it was unremarkable in that it simply applied pre-existing and clearly established law. It did so narrowly, so that future situations could be guided by its explanations, but constrained only by the facts of this particular case.

STATEMENT OF THE CASE

Underlying Facts of Record

Petitioner and His Family Were Engaged in Domestic Activities

On July 3, 2009, respondents Karen and Andrew Carman were sitting in their kitchen with Karen's sister, non-party Jacqueline Vergottini, making salads for their Fourth of July picnic the following day. (COA App. 27, 46; TT, 18:4-8, 37:6-15).[1]

Andrew Carman, Karen Carman and Ms. Vergottini were the only people present at the home. (COA App. 46; TT, 37:6-7).

Petitioner Carroll and Trooper Roberts

While on duty on July 3, 2009, Carroll, a Pennsylvania State Trooper, was dispatched to the Carman residence to look for a stolen vehicle with a New Jersey license plate and the operator of the

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[1] "COA App." refers to the Appendix in the Court of Appeals. "TT" refers to the Trial Transcript.

vehicle, Michael Zita, who had two loaded, stolen handguns in his possession. (COA App. 76-77, 90-91; TT, 67:18-68:13, 81:23-82:25).

When Carroll and non-party Trooper Roberts were dispatched to the Carmans' residence, they were told to look for a specific car bearing a New Jersey license plate number. (COA App. 72; TT, 63:7-10).

The troopers did not have a warrant to search the Carmans' property or to arrest Zita. (Pet. App. 3a).

None of the vehicles at the Carmans' residence were the stolen vehicle. (COA App. 72; TT, 63:11-15).

Description of the Property

The Carmans' house sits on a corner lot. The main street runs along the front of the house and a side street runs along the left of the house. (Pet. App. 4a).

The Carmans have a front door, with a clearly marked path leading up to it. (Pet. App. 4a; COA App. 21, 23, 44, 45, 254, 257; TT, 12:9-12, 14:6-9, 35:14-16, 36:5-9 Plaintiffs' Trial Exhibits 22, 26).[2]

When visitors come to the Carman home they use the front door entrance. (COA App. 24, 44, 45; TT,15:6-23, 35:20-36:4).

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[2] The Court of Appeals appended the photographs of the property which had been trial exhibits and which were relevant to the appeal as exhibits to its opinion. (Pet. App. 15a 19a). As discussed in more detail below, these photographs which are part of the Court of Appeals' opinion serve better than words to explain the facts and thus to limit the holding of that court's opinion.

The front door and front steps are shown in Plaintiffs' Trial Exhibit 26. (Pet. App. 19a).

The clearly marked path to the Carmans' front door is shown in Plaintiffs' Trial Exhibit 22. (Pet. App. 17a).

Carroll and Trooper Roberts never approached the Carmans' front door. (COA App. 74-75; TT, 65:24-66:5).

The back deck, which is physically attached to the house (and is where Carroll went instead of to the front door), has fencing around it. It has various items of domestic use on it, including tables with umbrellas, chairs and a grill. (Pet. App. 15a).

The Warrantless, Consentless Search of the Carmans' Garage

Carroll parked his patrol vehicle at the Carmans' residence, exited his vehicle and entered the Carmans' back yard and garage/car port because he claimed he saw a light on in the garage. (COA App. 79-80, 87, 88; TT, 70:21-71:13, 78:25-79:3).

However, the garage never had electricity, was never wired for electricity and never had any lights in it. (COA App. 25-26, 45, 251, 252; TT, 16:1-17:24, 36:10-22; Plaintiffs' Trial Exhibits 19, 20).

The incident at the Carmans' property happened at two o'clock in the afternoon in July on a sunny day. (COA App. 88; TT,79:4-10).

Carroll did not have a warrant to search the Carmans' house, yard, garage or curtilage. (COA App. 61,72, 79; TT, 52:11-12, 63:20-23, 70:10-14).

Carroll did not have an arrest warrant for Michael Zita. (COA App. 61, 72- 73; TT, 52:9-10, 63:24-64:1).

Carroll's Warrantless, Consentless Entry onto the Carmans' Curtilage

After searching the garage, Carroll and Trooper Roberts walked from the garage located in the back yard of the Carmans' property **onto the deck that is attached to the back of the Carmans' house**. (COA App. 63, 73-74; TT, 54:1-3, 64:24-65:3).

Ms. Vergottini glanced out the window and noticed police officers in the back yard. (COA App. 29, 46-47; TT, 20:17-20, 37:22-38:13).

The Carmans' back yard is an area where visitors don't usually go. (COA App. 47; TT, 38:1-9).

Disputed Facts

What happened next was disputed, but we discuss the version most favorable to petitioner Carroll.

Noticing Carroll and Roberts on his back deck, Mr. Carman came out of the house. According to the troopers, Mr. Carman was belligerent and aggressive, and asked "who the fuck are you?" Given this behavior, Carroll thought Carman might be Zita. In response to Carroll's questioning who he was, Mr. Carman refused to divulge his identity and turned away from the troopers. According to the troopers, Mr. Carman appeared to reach for his waist, bringing his hands outside the troopers' view. Fearing that Mr. Carman might be reaching for a weapon, Carroll grabbed Mr. Carman's arm. Mr. Carman twisted away and fell off

the deck. Mr. Carman was in fact unarmed. (Pet. App. 5a).

Despite being on his own deck attached to his own home, Mr. Carman was not free to return to the inside of his home. (COA App. 75, 95; TT, 66:12-21, 86:8-12).

Petitioner's Misstatements of Fact

At page 3 of his petition to this Court, Carroll states that "[d]ue to the layout of the property and parking area, the entrance from the deck appeared to be a customary entryway used by visitors arriving by car. . . ." However, the objective, undisputed and undisputable facts reveal otherwise. The photographs attached to the Court of Appeals' opinion (Pet. App. 15a-19a) show a front door and a path to a front door. The photographs show the absence of any sort of path to the back deck. The photographs show an enclosed back deck attached to a home. This reveals that the front door only appears to be the customary entryway used by visitors. Neither this Court nor any court should ignore objective, indisputable facts. As this Court observed at the summary judgment stage of a case, a court may not adopt a version of "facts" which is utterly contradicted by the record:

> [T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the

> record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. . .
>
> Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. **The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."**

Scott v. Harris, 550 U.S. 372, 380-81 (2007).

In the present case, the Court of Appeals was correct to rely on the objective facts, and not any make-believe version of facts which is objectively inaccurate. The importance of objectivity in this case is twofold. First, as discussed by *Scott*, *supra*, courts are bound to credit objective facts and disregard visible fiction. Second, the Fourth Amendment standard is an objective standard. *See, e.g.*, *Scott*, *supra*, 550 U.S. at 381 (discussing "the Fourth Amendment's 'objective reasonableness' standard" (*quoting Graham v. Connor*, 490 U.S. 386, 388 (1989))).

Petitioner Carroll also strategically but inaccurately discusses the "jury's finding" in this case. Carroll states that the "jury's finding [was] that this was such a situation" in which a "residence might have more than one entrance customarily used by visitors." Pet. Brief, at 7. However, petitioner simply conjured up this "jury finding." Nowhere in the record (or outside the record) is there any such finding. No special verdict question gave the jury an opportunity to make such a finding. Nor do the objective facts permit a

finding, as petitioner suggests at pages 15-16 of his brief, that there is one entrance customarily used by visitors arriving by foot and another used by visitors arriving by car; nor is it a beach house with a front door facing the water and a back door facing the access road; nor is it a lakeside home with a door from the dock in one direction and another door in another direction. The objective facts do not permit any such finding, the jury was not asked to make such a finding and it did not make such a finding.

* * *

In sum, the objective facts are that there was a clear path and entrance to the Carmans' front door. Petitioner Carroll chose to ignore that entrance. Carroll instead poked his head in a carport and then walked across a back lawn, climbed stairs to a back deck which had fencing on it and was attached to the back of the Carman home. Noticing this intrusion, Mr. Carman came outside and, according to Carroll, was rude. Carroll wound up grabbing Mr. Carman and causing Mr. Carman to fall off the deck. All of this could have been avoided had Carroll used the customary entrance at the front door which girl scouts, pizza deliverers, neighbors who wish to borrow a cup of sugar, and the rest of society recognizes as reasonable.

REASONS FOR DENYING THE WRIT

I. Petitioner Jeremy Carroll's Repeated Reference To The Third Circuit's "Categorical 'Front Door' Rule" Completely Misconstrues the Third Circuit's Holding

A. The Third Circuit's Holding and Reasoning Is Flexible; It is Not Categorical or Rigid

Petitioner Carroll repeatedly and inaccurately states that the Third Circuit created a "categorical 'front door' rule" or a "categorical rule." This could not be further from the truth. The Third Circuit did not create a categorical rule at all. Rather, the Third Circuit's holding in this case is based on the facts in this case, and is completely consistent with its sister circuits.

The Third Circuit explicitly recognized that while the front door is the default door in which visitors typically come, that is not always the case. "We recognize that there may be some instances in which the front door is not the entrance used by visitors. Despite Carroll's argument to the contrary, this is not one such instance." Pet. App. 9a, note 7.

Thus, the Third Circuit recognized that cases and factual situations differ and each have their own nuances. The Third Circuit simply found that the facts in this particular case established that Carroll violated the Fourth Amendment by attempting a "knock and talk" by bypassing the normal way that people attempt to talk to their neighbors or others with whom they are not acquainted.

The facts could not be clearer, and they were undisputed. The Carmans' home is on a small lot. There is a clearly defined front door with a front foot path leading to it. This is the signal of the implicit license society recognizes that we give to others to come visit.

There was no similar path in the backyard. There was nothing to indicate that the Carmans expected visitors to traipse across their backyard, open the gate on their deck, climb the steps onto the deck and knock on the sliding glass door in the back of the house.

On the particular facts of this case, the Third Circuit found that Carroll's entry onto the Carmans' curtilage violated their Fourth Amendment rights.

In addition to the Third Circuit's explicit recognition that there are some instances in which the front door is not the entrance used by visitors (Pet. App. 9a, note 7), in other parts of its opinion the court recognized that the front door is the usual, but not categorical, place where visitors including police officers may make inquiry. For example, the Third Circuit quoted this Court's opinion in *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409 (2013): The "implied invitation" to talk to a person in a home "'**typically** permits the visitor to approach the home by the front path. . . . Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.'" (Pet. App. 10a, *quoting Jardines*, 133 S. Ct. at 1415; emphasis added).

The Third Circuit also discussed its prior opinion in *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003):

> Although officers have a right to knock at the front door while executing a "knock and talk," this right does not "necessarily extend[] to the officers the right to enter [elsewhere] into the curtilage. *Marasco*, 318 F.3d at 520. In *Marasco*, we recognized that an officer's entry into other parts of the curtilage "*after not receiving an answer at the front door* might be reasonable" in limited situations. *Id.* (emphasis added).

Pet. App. 11a.

The Third Circuit thus re-affirmed its prior holding that depending on the facts police officers may enter other parts of curtilage. The front path and front door may be the typical default place in which police officers, like the rest of society, may initiate a consensual encounter with persons in a home. But the Third Circuit in no way created a "categorical rule."

In the present case, the Third Circuit simply recognized that the layout of the Carmans' home and property made clear that the front door was the usual way of initiating contact with the residents. Carroll's choice to park near the back, so it was easier to cut across the back yard and climb onto the back deck attached to the home did not somehow negate the implied license to begin an encounter at the front door.

B. Caselaw Discussed By Petitioner

A review of the Third Circuit's opinion and its absence of the "categorical rule" petitioner denounces should end the inquiry into whether there is a split in the circuits warranting Supreme Court review. Nonetheless, we will discuss cases cited by petitioner Carroll to show that the circuits, including the Third Circuit, are in complete accord.

Petitioner Carroll first discusses *U.S. v. James*, 40 F.3d 850 (7th Cir. 1994), *vacated on other grounds*, 516 U.S. 1022 (1995). (Petitioner's Brief, at 8-9). In *James*, the officers "used a paved walkway along the side of the duplex leading to the rear side door. . . Both the paved walkway and the rear side door were accessible to the general public and the rear side door was commonly used for entering the duplex from the nearby alley." *Id.*, at 862. This contrasts with the present case in which there was no paved or other walkway across the Carmans' back yard, there was no alleyway or other access to the back yard (other than outright trespassing), and there was zero indication that cutting across the back yard and climbing onto the back deck constituted public access. Unlike the officers in *James* who used a paved walkway, Carroll chose not to use the existing and obvious pathway to the front door.

Carroll next discusses *U.S. v. Titemore*, 437 F.3d 251 (2d Cir. 2006). *Titemore*, like *James*, *supra*, is distinguishable on its facts. It does not pronounce any rule of law different from that which the Third Circuit discussed in the present case. In *Titemore*, the court found that the sliding-glass door and porch at which the police officer approached the house "constitute[d] part of a principal entranceway." *Id.*, at 259. Part of

the court's analysis which led to that conclusion was that "the evidence established that the sliding-glass door was in fact a primary entrance visible to and used by the public. The porch, door, and lawn faced Patton Shore Road and were visible from both Patton Shore and Titemore Woods Roads. Three steps led up to the porch, indicating that was a means of ingress and egress. And there was also a doorbell, albeit one that was not working, which would suggest to visitors that they could visit the home from the porch." *Id.* Here, unlike the property in *Titemore*, the evidence established that the door in question was **not** a primary entrance. The door was not visible to or used by the public. The Carmans' sliding door on their back deck did not face any street, but only their back yard, and there was no doorbell on it. On the other hand, the Carmans' front door, front porch and front pathway had all the hallmarks of a primary entrance.

In *U.S. v. Thomas*, 430 F.3d 274 (6th Cir. 2006), cited by Carroll at page 10 of his brief, the district court had made explicit findings that the back door in question "was customarily used as the entrance to the house," and the homeowner did not argue otherwise. *Id.*, at 280. In *U.S. v. Garcia*, 997 F.2d 1273 (9th Cir. 1993), cited by Carroll at page 10 of his brief, the district court found that the officers had a good faith belief that they were going to the front door of the apartment in question. 997 F.2d at 1279. The court concluded that "[i]f the front and back of a residence are readily accessible from a public place, like the driveway and parking area here, the Fourth Amendment is not implicated when the officers go to the back door reasonably believing it is used as a principal entrance to the dwelling." *Id.*, at 1279-80.

These cases are completely different from the present case, in which there were no such factual findings in the district court, and in which the objective evidence could yield only a single conclusion: that the front path, front porch and front door were the primary entrance to the home, and that the sliding glass door to the raised deck which was not visible from any public place was not the primary entrance.

Carroll's citation to *U.S. v. Wells*, 648 F.3d 671 (8th Cir. 2011) does not help him. In finding a foray into the backyard unconstitutional, the court explained the law the same law applied by the Third Circuit. "A backyard that is accessible only by walking around the side of a home is a place generally recognized as 'an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.'" *Id.*, at 677, *quoting Florida v. Riley*, 488 U.S. 445, 452 (1989) (O'Connor, J., concurring) (further citations omitted). *Wells* explained that "[t]o the extent that the 'knock-and-talk' rule is grounded in the homeowner's implied consent to be contacted at home, we have never found such consent where officers made no attempt to reach the homeowner at the front door." *Wells*, 648 F.3d at 679. *Wells* further stated that "[w]e are not prepared to extend the 'knock-and-talk' rule to situations in which the police forgo the knock at the front door and, without any reason to believe the homeowner will be found there, proceed directly to the backyard. *Id.*, at 680. Carroll did exactly what *Wells* explained was not permitted: he chose the back deck sliding door and not the front door, without any reason to believe the back deck door was the primary entrance or that that was where the homeowners would be.

Carroll also refers to two state cases. In *State of New Jersey v. Domicz*, 188 N.J. 285, 907 A.2d 395 (2006), discussed by Carroll at pages 10-11 of his brief, the trial court made factual findings which included crediting the testimony of the officers that the position of parked cars in defendant's driveway led them to believe that the back door was used by residents and visitors. Further, the officers did not observe any criminal wrongdoing or contraband before returning to the front of the house where the homeowner had answered the door. *Id.*, 188 N.J. at 301, 907 A.2d at 404. The court was explicit that its holding was "[i]n light of the trial court's findings." 188 N.J. at 303, 907 A.2d at 405. As discussed above, in the present case there were neither judicial findings of fact (as exist in most curtilage or knock-and-talk cases, because they typically arise in motions to suppress evidence in criminal cases), nor were there identifiable factual findings by a jury.

Finally, at page 11 of his brief, Carroll refers to *Trimble v. State of Indiana*, 842 N.E.2d 798 (Ind. 2006). In *Trimble*, the officer "pulled into Trimble's driveway, which wrapped around the back of Trimble's house, and parked his car behind the house. Most of the traffic to Trimble's house goes to the back door." 842 N.E.2d at 801. Because the officer entered the property "through the normal route of access" (*id.* at 800), there was no Fourth Amendment violation.

* * *

None of the cases petitioner Carroll cites state a different rule than that enunciated and applied by the Third Circuit. On the facts of those cases, the result or

legal conclusion would have been the same had the case been heard in the Third Circuit.

We understand Carroll's attempt to identify some sort of a rift between the circuits, but such a rift simply does not exist. There is no split in the circuits. The Third Circuit opinion is not in conflict with the decision of any other United States court of appeals decision, nor does it conflict with a decision of any state court of last resort, nor has it departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court. Supreme Court Rule 10(a).

C. The Carmans Agree: How A Police Officer May Lawfully Approach a Residence to Conduct a "Knock and Talk" Is Important

At pages 11-12 of his brief, petitioner Carman correctly states that how a police officer may lawfully approach a residence to conduct a knock-and-talk is an important issue to police officers. It is no less nor more important to police officers than every other constitutional issue, *e.g.*, what constitutes probable cause or reasonable suspicion; what constitutes an arrest, investigatory detention or a mere encounter; what constitutes exigent circumstances in different situations; when can a car be stopped and for how long; what warnings must be given to suspects before interrogating them, and in what circumstances. There are many constitutional issues which impact on law enforcement. They are all important.

In the present case, the Third Circuit's opinion is not the categorical or rigid opinion which Carroll

pretends it is. It states the same principals of law as stated by its sister circuits and by this Court. The Third Circuit's opinion gives police officers appropriate guidance. (Pet. App. 9a-11a). The court explained, quoting *Jardines*, *supra*, that "'a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" Pet. App. 9a. The Third Circuit gave significant guidance in the following pages of its opinion, both as to what is or is not permitted, and the underlying rationale for the rule.

The Third Circuit did not lay down a rigid rule, but gave guidance as to the rule, its rationale and the exceptions to the rule. Nothing more can be asked of a court, especially when it tethers its opinion to the facts of the case before it, as the Third Circuit did by, among other ways, appending the photographs of the property to its opinion.

The hypothetical factual scenarios petitioner discusses at page 12 of his brief are all covered by the Third Circuit's opinion, explanations and rationales. Were the court to attempt more, it would have to issue advisory opinions on a host of situations not before it.

There is simply no utility for this Court to grant *certiorari* in this case.

II. The Law Was Clearly Established Long Before the Events at Issue Here; Petitioner Is Not Entitled To Qualified Immunity

At pages 16-18 of Carroll's Petition For Writ of Certiorari, he makes a qualified immunity argument.

That argument is wrong for multiple reasons, and certainly not worthy of this Court's review.

First, petitioner Carroll relies on the faulty premise that the Court of Appeals created a categorical rule. As discussed above and as any plain reading of that court's opinion reveals, the Court of Appeals simply did not explicitly or implicitly create such a rule. Carroll simply shields his eyes from the Court of Appeals' actual words: "We recognize that there may be some instances in which the front door is not the entrance used by visitors. Despite Carroll's argument to the contrary, this is not one such instance." Pet. App. 9a, note 7. Throughout his qualified immunity argument, petitioner Carroll refers to the Court of Appeals' phantom "categorical rule."

Second, petitioner Carroll correctly notes that the Court of Appeals discussed its prior decision in *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003). In *Marasco*, the Third Circuit discussed the fact that police officers are always permitted to enter parts of property to which the general public or visitors would be permitted. 318 F.3d at 519. The court then discussed the fact that in some circumstances officers pursuing a lawful objective might reasonably enter other parts of the curtilage. The court gave examples of such instances. 318 F.3d at 520-21.

Petitioner Carroll's citation on page 18 of his brief to *Lease v. Tyler*, 2008 WL 2673381 (M.D.Pa. 2008) as somehow revealing confusion is completely off the mark. In *Lease*, as Carroll acknowledges, the officer walked to a "side common entrance to an apartment building." (*6). This was a "common area utilized by those entering and exiting the building." *Id.* *Lease* is

completely consistent with the result in the present case and with the prior caselaw. *Lease* simply applied that law to a situation in which police had the same right as all others to approach a non-private, common area used by multiple people from multiple households.

The point that the police cannot tread at will into any part of curtilage is obvious and well-known. *See e.g., Maryland v. King*, __ U.S. __, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting) ("And could the police engage, without any suspicion of wrongdoing, in a 'brief and...minimal' intrusion into the home of an arrestee-perhaps just peeking around the curtilage a bit? [citation omitted] Obviously not.").

This Court has been clear, long before the events in the present case, that police without a warrant may enter the curtilage of a home in a similar manner to other members of the public, but not in a manner which exceeds the license extended to members of the public. While *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409 (2013) was decided after the events in the present case, both its majority opinion and dissent discuss long and clearly established law.

For example, the majority opinion explained, *inter alia*, as follows:

> We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." *Oliver*, *supra*, at 180, 104 S.Ct. 1735. That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law,"

Hester, *supra*, at 59, 44 S.Ct. 445, so too is the identity of home and what Blackstone called the "curtilage or homestall," for the "house protects and privileges all its branches and appurtenants." 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769). This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

While the boundaries of the curtilage are generally "clearly marked," the "conception defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Oliver*, 466 U.S., at 182, n. 12, 104 S.Ct. 1735. Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends." *Ibid.*

* * *

"A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee v. Gratz*, 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v. Alexandria*, 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). This implicit license typically permits the visitor to approach the

> home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." *Kentucky v. King*, 563 U.S. ——, ——, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011).

Jardines, 133 S. Ct. at 1414-16.

The cases cited by the *Jardines* Court, for all of the propositions which are relevant to the present case, were decided well before the events in this case. Blackstone's Commentaries on the Laws of England, of course, was published more than two centuries prior to the events in this case.

Justice Alito's dissent in *Jardines* was also crystal clear, and it too relied on long established law and older cases which explained to any reasonable police officer what he or she is permitted to do, and forbidden from doing. In explaining the limited license that police, like every other person, have to approach a house, Justice Alito used the phrases "front door" or "front porch" at least 21 times.

While Justice Alito's opinion was a dissent, his opinion was premised on the fact that the police officers in *Jardines* – unlike petitioner Carroll – "approached the front door via the driveway and a paved path – the

route that any visitor would customarily use." *Id.* at 1421.

Citing caselaw and scholarly commentary which preceded the events in the present case, Justice Alito explained:

> It is said that members of the public may lawfully proceed along a walkway leading to the front door of a house because custom grants them a license to do so. *Breard v. Alexandria*, 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); *Lakin v. Ames*, 64 Mass. 198, 220 (1852); J. Bishop, Commentaries on the Non–Contract Law § 823, p. 378 (1889). This rule encompasses categories of visitors whom most homeowners almost certainly wish to allow to approach their front doors—friends, relatives, mail carriers, persons making deliveries. But it also reaches categories of visitors who are less universally welcome—"solicitors," "hawkers," "peddlers," and the like.

Id. at 1421-22.

Justice Alito further explained:

> Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.

Id. at 1422. That is exactly what petitioner Carroll did in this case, except that he did not "meander." He ignored the front path, front porch and front door, and walked across the back and climbed on the back deck.

Justice Alito also cited with approval to *United States v. Wells*, 648 F.3d 671, 679-80 (8th Cir. 2011) for the proposition that the "police exceeded scope of their implied invitation when they bypassed the front door and proceeded directly to the back yard." *Jardines*, 133 S. Ct. at 1422.

Multiple other cases in the circuits and in this Court have held similarly (presumably, the cases to which Carroll refers this Court are the most favorable he can find to his position; as discussed above, they all state the same rule of law as the Third Circuit did in the present case). The law is clear. The Third Circuit did not overstep or extend the law; it simply applied pre-existing law to the facts of this case.

* * *

The Third Circuit's opinion in this case is in line with this Court's cases, the various circuits' cases and ancient common law. While the case is important to the parties, it is an unremarkable case in all respects.

CONCLUSION

The Third Circuit's opinion in this case was not only correct, it did not strike new ground. The opinion is completely consistent with this Court's cases, and with law that developed over the last several centuries. There is no conflict between the circuits. Petitioner strains to interpret in the Third Circuit's opinion something which simply is not there.

This Court should deny *certiorari*.

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Supreme Court, U.S.
FILED
SEP 9 - 2014
OFFICE OF THE CLERK

No. 14-212

In the Supreme Court of the United States

JEREMY CARROLL,
Petitioner

v.

ANDREW CARMAN AND KAREN CARMAN,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

A jury found that a state trooper acted reasonably when, seeking to conduct a "knock and talk," he approached the back door of a residence because it appeared to be a customary entrance used by visitors. In reversing, the Court of Appeals for the Third Circuit created a categorical rule that "a 'knock and talk' encounter *must* begin at the front door . . . [,]" Pet. App. 10a (emphasis added), failing to allow for the possibility that a residence may have more than one entrance customarily used by visitors. This *per se* rule ignores the complexity of the real world and conflicts with other Courts of Appeals, at least two state supreme courts, and the governing principles of Fourth Amendment jurisprudence.

Recognizing that a categorical "knock and talk" rule would place the Third Circuit in conflict with other circuits, respondents proffer two main arguments in opposition to certiorari: (1) that the jury did not find what it *must* have found to reach its verdict in favor of Trooper Carroll; and (2) that the Court of Appeals' opinion does not mean what it actually says. Both arguments are untenable.

1. First, in finding for Trooper Carroll, the jury must have found that the back entrance to the Carmans' residence was customarily used by visitors. The district court instructed the jury on the "knock and talk" doctrine as follows:

> This doctrine allows officers without a warrant to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants, just as any private citizen might. Officers should restrict their movements . . . to walkways,

> driveway, porches and places where visitors could be expected to go.

COA App. 156-57 (jury charge).[1] "The law presumes that a jury will find facts and reach a verdict by rational means." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 396 (1991). In light of these instructions, the only rational explanation for the verdict in this case was that the jury found that the back door *was* a "place[ ] where visitors could be expected to go," and that Trooper Carroll *had* acted "just as any private citizen might." COA App. 156-57.

Respondents offer no other explanation for how the jury could have reached the verdict it did; nor do they ever say just what they think the jury *did* find, if not that the back door appeared to be customarily used by visitors. Instead, the bulk of respondents' argument is an extended attempt to re-litigate issues that the jury resolved against them.[2] *See* Br. in Opp. at 5-8. But the time for doing that is long past, and respondents waived the opportunity when they had it: respondents filed no Rule 50(b) motion challenging the sufficiency of the evidence.

This has important implications for the nature of the Court of Appeals' holding. Not only did the Court of Appeals leave the jury's findings undisturbed,[3] but

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[1] The Court of Appeals appendix will be cited as "COA App." followed by the page number.

[2] For example, respondents repeatedly assert that their deck was behind a fence or gate. Br. in Opp. at 4, 6, 8, 10. The jury, however, heard evidence that the gate appearing in Plaintiffs' Exhibit 18 (*see* Pet. App. 15a) was not present on July 3, 2009. COA App. 93 (trial testimony of Trooper Carroll). The Court of Appeals makes no reference to a gate or fence in its opinion.

[3] Pet. App. 3a n. 2 (recognizing its obligation to construe the facts "in the light most favorable to Carroll").

given the lack of a Rule 50(b) motion, it could not have done otherwise. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 407 (2006). The Court of Appeals did not (and could not) hold that the jury's findings were wrong, but that they were irrelevant; and they were irrelevant precisely *because*, as we now discuss, the Court of Appeals rejected a "reasonableness" approach in favor of a categorical legal rule.

2. Contrary to respondents' argument, the Court of Appeals did not conduct the classic Fourth Amendment reasonableness analysis. Despite the jury's finding that the back door was an entranceway where visitors could be expected to go, the Court of Appeals held that the front door was the *only* permissible approach to the residence: "a 'knock and talk' encounter *must* begin at the front door because that is where police officers, like any other visitors, have an implied invitation to go." Pet. App. 10a (emphasis added). Although the Court of Appeals "recognize[d] that there may be some instances in which the front door is not *the* entrance used by visitors[,]" Pet. App. 9a n.6 (emphasis added), the use of the article "the" reinforces the holding that there exists one, and only one, permissible "knock and talk" approach to a residence.

This rule is thus categorical as it makes no allowance for multiple visitor entryways. Rather, so long as the front door is accessible, the Court of Appeals' holding requires its use in every circumstance: "[t]he 'knock and talk' exception requires that police officers begin their encounter at the front door"; "[b]ecause Carroll did not knock on the Carmans' front door, his intrusion cannot be justified as a 'knock and talk.' " Pet. App. 11a.

This holding abandons reasonableness in favor of a *per se* rule, conflicting with the holdings of other federal and state appellate courts that found no Fourth Amendment violation when a side or back door was approached by officers even though a "front door" was accessible. *See e.g. U.S. v. Titemore*, 437 F.3d 251 (2d Cir. 2006); *U.S. v. Thomas*, 430 F.3d 274 (6th Cir. 2006); *U.S. v. James*, 40 F.3d 850 (7th Cir. 1994), *vacated on other grounds*, 516 U.S. 1022 (1995); *U.S. v. Garcia*, 997 F.2d 1273, 1279-1280 (9th Cir. 1993); *State of New Jersey v. Domicz*, 907 A.2d 395 (N.J. 2006); *Timble v. State of Indiana*, 842 N.E.2d 798, 801-802 (In. 2006). These courts recognized that a residence may have more than one entrance customarily used by uninvited visitors and held that a police officer may approach via *any* route that an uninvited visitor might reasonably be expected to use. *Ibid.*

Respondents attempt to distinguish each of these cases from the instant case by noting the different property layouts and unique sets of circumstances. However, these distinctions support petitioner's argument, as they demonstrate the unworkability of a categorical rule in this context. Properties do not adhere to a single uniform design, but present police officers with a myriad of differing layouts to navigate. As the jury found in this case, a home may possess more than one entranceway reasonably appearing to be customarily used by visitors. The Court of Appeals' rigid holding limiting a "knock and talk" approach to only a single primary entranceway, as defined by the hindsight of a reviewing court, is unsuited for the complex real world. The Fourth Amendment requires police officers be reasonable, not clairvoyant.

The Court should review this case to resolve the conflict in Fourth Amendment jurisprudence the Court of Appeals has created.

CONCLUSION

The Court should grant the petition.

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DATE:

September 9, 2014

Supreme Court, U.S.
FILED
SEP 9 - 2014
OFFICE OF THE CLERK

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND TWENTY OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires a police officer who approaches a residence to conduct a "knock and talk" to go to the "front door" of the residence, even where it reasonably appears that some other entrance is also customarily used by visitors.

2. Whether the Court of Appeals erred in holding that its new "front door" rule was "clearly established" for purposes of qualified immunity.

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INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

In its decision below, the Third Circuit held a police officer civilly liable for conducting a "knock and talk" interview at a door of a residence that he reasonably believed was a customary entryway for visitors. As the chief law enforcement officers of their respective states, the State Attorneys General have a vital interest in ensuring that police officers investigating criminal activity retain the tools necessary to serve the important public interest in truth gathering, while honoring the Fourth Amendment's protections.[1] The State Attorneys General also have a crucial interest in ensuring that those same officers are not subjected to civil liability for their reasonable, good-faith judgments about what the law requires.

The question here is whether the Fourth Amendment requires a police officer conducting a "knock and talk" to go to the "front door" of a residence, even where it reasonably appears that some other entrance is also customarily used by visitors. The Third Circuit answered in the affirmative, in conflict with decisions by the Second, Sixth, Seventh, and Ninth Circuits, as well as by the New Jersey and Indiana Supreme Courts.

The answer directly affects the daily activities of thousands of police officers across the 50 States who routinely and legitimately seek to engage in

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[1] In Louisiana, the Attorney General does not have original criminal jurisdiction, but prosecutes when called upon to do so by a district attorney.

consensual encounters with individuals in the course of investigating crime. Officers conducting a "knock and talk" with an individual at a place of residence do not operate in a simplistic, cookie-cutter world in which each residence looks alike and where a bright-line rule tells the officers which door to approach. Instead, these officers face a myriad of unique environments that require them to rely on their reasonable judgment to assess how the Fourth Amendment applies.

The Third Circuit's decision requiring an officer conducting a "knock and talk" to use "the front door," when a jury found that he had acted reasonably in approaching what he believed was a customary entrance, creates confusion and uncertainty for officers where a residence has no clear front door, or where it appears that visitors customarily use multiple entrances. Though it hampers officers' ability to make quick decisions in unique settings, the Third Circuit's decision adds nothing to the protections of the Fourth Amendment.

This issue requires this Court's review. The Third Circuit's decision contradicts decisions by other federal and state appellate courts on the same matter, and the constitutionality of a "knock and talk" cannot depend on the jurisdiction in which it occurred. The decision also contravenes this Court's Fourth Amendment jurisprudence in several important respects. Finally, if this Court decides to consider the merits of the Third Circuit's new "knock and talk" rule, its holding that its new rule was "clearly established" for purposes of § 1983 liability is a serious error that also merits this Court's review.

STATEMENT OF FACTS

On July 3, 2009, Trooper Jeremy Carroll received a call that a person of interest may be located at 101 Raspberry Path in Dingman's Ferry, the residence of Andrew and Karen Carman. Pet. App. 3a. Trooper Carroll and Trooper Brian Roberts drove separately to the house, to see if they could make contact with the individual. The troopers had no warrant and had never been to the property. *Id.* at 3a–4a.

The Carmans' house was located on a corner lot, with a street running along the front of the house and a street running along the left of the house, as viewed from the front. *Id.* at 4a. There was no parking area in the front; instead, numerous cars were parked to the left of the house in a graveled area that adjoined the back yard. *Id.* There was no barrier between the parking area and the back yard. *Id.* at 29a. Troopers Carroll and Roberts parked in the graveled area, with the other cars. *Id.* at 4a.

Upon exiting their vehicles, the troopers were in the back of the Carmans' property, facing the back of the house. *Id.* at 4a, 30a–31a. Due to the layout of the property and parking area, Trooper Carroll thought the sliding door attached to the back deck "looked like a customary entryway" for visitors arriving by car. *Id.* at 4a. The troopers approached the back deck to conduct a "knock and talk." *Id.* at 5a, 29a. As they approached, Mr. Carman came out of the back door and aggressively demanded to know who the troopers were. *Id.* at 5a. After a minor scuffle, the troopers determined that Mr. Carman was not the individual for whom they were looking, but that Mr. Carman knew the person of interest. *Id.*

at 23a. The troopers obtained consent from Ms. Carman to search the house for that individual, but found no one. *Id.* at 5a. The Carmans did not ask the troopers to leave after the search, but instead talked with them for another twenty to thirty minutes. COA App. 86–87. Mr. Carman testified at trial that he was not upset that the troopers had approached his back door. COA App. 35–36.

The Carmans subsequently brought suit against Trooper Carroll under 42 U.S.C. § 1983, claiming among other things that his entry onto their property constituted an unlawful search under the Fourth Amendment. Pet. App. 5a–6a. The suit presented the question whether Trooper Carroll's approaching the back door constituted a lawful "knock and talk," which permits an officer without a warrant to knock at a resident's door and ask to speak with the inhabitants, just as any private citizen might, provided the officer restricts his or her movements to places where visitors could be expected to go. The district court denied the Carmans' motion for summary judgment on that question, finding among other things that it lacked sufficient information to decide as a matter of law whether the rear porch door was an entrance customarily used by visitors. *Id.* at 28a–31a. The district court instructed the jury on the "knock and talk" doctrine, including that the officer must restrict his or her movements to places where visitors could be expected to go. COA App. 156–57. The jury returned a verdict in Trooper Carroll's favor, Pet. App. 7a, thereby necessarily concluding that his approach was reasonable.

On appeal, the Third Circuit rejected the jury's implicit finding that Trooper Carroll had acted reasonably, ruling that the Fourth Amendment required him to conduct his "knock and talk" at the Carmans' front door. *Id.* 9a–12a. The Court recognized that "there may be some instances in which the front door is not the entrance used by visitors," but found that "this is not one such instance," *id.* at 9a n.6, noting elsewhere in its opinion the Carmans' testimony that visitors customarily used the front door, *id.* at 4a. The Court went on to hold that: the officer conducting a "knock and talk" "must" start at the front door, *id.* at 10a; "Carroll cannot avail himself of the 'knock and talk' exception . . . because he entered the back of the Carmans' property without approaching the front door first," *id.* at 11a; and "[b]ecause Carroll did not knock on the Carmans' front door, . . . his intrusion cannot be justified as a 'knock and talk,' " *id.* at 11a.

The Third Circuit remanded with instructions to enter judgment against Trooper Carroll, holding that he was not entitled to qualified immunity because the Court's front-door rule was clearly established by *Estate of Smith* v. *Marasco*, 318 F.3d 497 (3d Cir. 2003). Pet. App. 14a.

ARGUMENT

The Court of Appeals held a police officer civilly liable for not using the front door of a residence to conduct a "knock and talk," despite the jury's verdict that he reasonably approached a door that he believed was a customary entryway for visitors. This holding conflicts with that of other federal and state appellate courts, and is inconsistent with this Court's Fourth Amendment jurisprudence. Moreover, the Third Circuit's holding that its front door rule was "clearly established" for purposes of § 1983 liability is a substantial error that merits this Court's review.

I. The Third Circuit's decision conflicts with the holdings of other federal and state appellate courts.

In ruling that the Fourth Amendment required Trooper Carroll to approach the front door of the Carmans' residence to conduct a "knock and talk," the Third Circuit necessarily rejected the jury's finding that the trooper had reasonably approached the back entrance, which he believed to be a customary entryway. The Court of Appeals' holding, at best, reflects a ruling that, as a matter of law, there can be only one customary entrance to each residence. While the Carmans' brief in opposition suggests that footnote six of the opinion qualifies that categorical rule, the court's application of the rule contains no qualifying language and permits no exceptions. The court categorically instructed that a "knock and talk" "must begin at the front door"; held that Trooper Carroll did not meet the requirements "because he entered the back of the Carmans' property without approaching the front door first";

and ordered the district court to impose damages on an officer for approaching a door the jury found was reasonable for him to use. Pet. App. 10a–11a, 14a. Indeed, no responsible police chief would permit an officer to approach customary entrances other than the front door in light of the Third Circuit's opinion—footnote six notwithstanding. On any reading, the decision contradicts the holdings of four other federal Courts of Appeals, which have rejected attempts by residents to limit police officers to the "front door," or to only one of multiple customary entryways.

In *United States* v. *James*, 40 F.3d 850 (7th Cir. 1994), vacated on other grounds, 516 U.S. 1022 (1995), officers conducting a "knock and talk" used a paved walkway along the side of a duplex to approach a rear side door. *Id.* at 862. The passage and rear side door were accessible to the general public and were not blocked off by a gate or fence. *Id.* The rear side door was commonly used for entering the duplex from the nearby alley. *Id.* On appeal, James argued that "police officers seeking to interview a person are always required to knock on the front door of a residence before they may approach any other public means of access to the dwelling." *Id.* at 862 n.4. The Seventh Circuit rejected this argument, holding that "where the back door of a residence is readily accessible to the general public, the Fourth Amendment is not implicated when police officers approach that door in the reasonable belief that it is a principal means of access to the dwelling." *Id.* at 862.

Likewise, there were two entryways to the Titemore residence in *United States* v. *Titemore*: a

porch with a sliding door on the east side of the house, and a door with a motion light, doorbell, and welcome mat on the west side. 335 F. Supp. 2d 502, 504 (D. Vt. 2004); 437 F.3d 251, 253 (2d Cir. 2006). Although there was no walkway to the east-side sliding door, the trooper chose to walk across the lawn and approach that door because he saw Titemore watching television inside. 335 F. Supp. 2d at 505; 437 F.3d at 254. Titemore argued on appeal that the trooper had violated the Fourth Amendment by walking across his lawn to question him at a side porch. The Second Circuit rejected this argument, explaining that the trooper had "approached a principal entrance to the home using a route that other visitors could be expected to take[.]" 437 F.3d at 252. The court held that Titemore had no reasonable expectation of privacy in his side porch, where the porch faced a road and "constitute[d] part of a principal entryway" that was visible to and used by the public, and no fence enclosed the porch and lawn area. *Id.* at 259.

The Sixth Circuit has also upheld officers' exclusive use of a back door in *United States* v. *Thomas*, 430 F.3d 274 (6th Cir 2006). In *Thomas*, two officers knocked on the back door of Thomas's home. *Id.* at 276. The Sixth Circuit rejected his argument that the officers violated his Fourth Amendment rights by approaching the rear door, explaining that "the rear deck was adjacent to the driveway" and "was customarily used as the entrance to the house"; thus, the police had breached no reasonable expectation of privacy. *Id.* at 280.

The Ninth Circuit similarly ruled in *United States* v. *Garcia* that "[i]f the front and back of a residence are readily accessible from a public place, like the driveway and parking area here, the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling." 997 F.2d 1273, 1279–80 (9th Cir. 1993).

Police officers conducting "knock and talks" in New Jersey will have to follow the Third Circuit's more stringent front-door/one-entrance rule, even though the New Jersey Supreme Court has held it permissible for officers to use customary entrances other than the front door. In *State of New Jersey* v. *Domicz*, 907 A.2d 395 (N.J. 2006), two officers knocked on Domicz's back door after passing through a gate that separated the driveway from the rear of the residence. *Id.* at 398. On appeal, the Appellate Division remanded, instructing the trial court to reconsider whether the warrantless intrusion into Domicz's back yard transgressed his reasonable expectation of privacy. *State* v. *Domicz*, 873 A.2d 630, 652 (N.J. App. Div. 2005). The Supreme Court of New Jersey reversed. 907 A.2d 395 (N.J. 2006). Noting the officer's testimony—which the trial court had found credible—that the position of the parked cars in the defendant's driveway had led the officers to believe that the back door was used by residents and visitors, the court explained that where an officer "reasonably believes that the door is used by visitors, he is not unconstitutionally trespassing on the property." *Id.* at 405.

The Supreme Court of Indiana likewise upheld a back-door "knock and talk" in *Trimble* v. *State of Indiana*, 842 N.E.2d 798 (Ind. 2006). In *Trimble*, an officer "pulled into Trimble's driveway, which wrapped around the back of Trimble's house, and parked his car behind the house." *Id.* at 801. On appeal, the Indiana Court of Appeals held that the officer's warrantless search of a dog house in the back yard, after knocking on the back door, violated the Fourth Amendment. *Id.* The Supreme Court of Indiana reversed, holding that the officer's entry into Trimble's back yard was a route "that any visitor was invited to take." *Id.* at 802. The court further held that "[w]hich areas of a given piece of real estate may reasonably be viewed as open to visitors is fact-specific." *Id.*

If Trooper Carroll had approached the Carmans' back door in the Second, Sixth, Seventh, or Ninth Circuits, or in New Jersey or Indiana, he would not have been liable to the Carmans for damages. But the constitutionality of a "knock and talk" cannot depend on the jurisdiction in which it occurred. This Court should grant certiorari and resolve this important conflict in Fourth Amendment law, which affects thousands of state and federal police officers.

II. The Third Circuit's decision is inconsistent with this Court's Fourth Amendment jurisprudence.

The Third Circuit's decision also contravenes this Court's Fourth Amendment jurisprudence in several important respects.

The "knock and talk" is a long-recognized police tool that furthers the public's interest in information-gathering, while respecting the property interests, reasonable expectations of privacy, and freedom of movement that the Fourth Amendment protects. As courts have traditionally defined it, the "knock and talk" is a legitimate investigative technique aimed at achieving a person's consent to questioning or a search. See *United States* v. *Thomas*, 430 F.3d 274, 277 (6th Cir. 2005).

This Court has long held that consensual encounters between police and suspects or witnesses are excluded from the Fourth Amendment's prohibitions, explaining that "even when officers have no basis for suspecting a particular individual," they may question that individual and request to search his or her property "as long as the police do not convey a message that compliance with their requests is required[.]" *Florida* v. *Bostick*, 501 U.S. 429, 434–35 (1991). The "knock and talk" doctrine allows officers to approach a home and knock, "precisely because that is no more than any private citizen might do," *Florida* v. *Jardines*, 133 S. Ct. 1409, 1415–16 (2013) (internal citations and quotations omitted), and "the occupant has no obligation to open the door or to speak," *Kentucky* v. *King*, 131 S. Ct. 1849, 1862 (2011).

At the same time as it promotes the public's interest in consensual information-gathering, the "knock and talk" doctrine respects the many important protections of the Fourth Amendment, as expressed in this Court's jurisprudence. First, it respects a resident's freedom from physical intrusion

into constitutionally protected areas. The Fourth Amendment "'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects." *Jardines*, 133 S. Ct. at 1414 (quoting *Oliver* v. *United States*, 466 U.S. 170, 176 (1984)). Included within the zone of protected spaces is the curtilage of a home. But the curtilage is not wholly off-limits to a warrantless police officer: the officer may approach a residence via the curtilage in an attempt to speak with the resident if the officer follows a path for which he is deemed to have a license under traditional trespass principles. See *Jardines*, 133 S. Ct. at 1415. A license "may be implied from the habits of the country" and is defined, in part, by what a private citizen may be expected to do. *Id.* at 1415–16. Determining the existence and scope of a license requires examination of all the surrounding circumstances. Restatement (Second) of Torts § 330, cmt. e (2014) (defining licensees).

When the police "come on to private property to conduct an investigation . . . and restrict their movements to places visitors could be expected to go (*e.g.*, walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment." Wayne R. LaFave, 1 Search and Seizure § 2.3(f) (5th ed. 2013). See also *Jardines*, 133 S. Ct. at 1416; *Estate of Smith* v. *Marasco*, 318 F.3d 497, 519 (3d Cir. 2003). Thus, the "knock and talk" respects a resident's property rights by limiting a police officer's movements to customary entry routes, where visitors have an implied license to go.

The "knock and talk" also respects a resident's reasonable expectations of privacy. A "search" within the meaning of the Fourth Amendment occurs when police infringe on a subjective expectation of privacy that society is prepared to recognize as reasonable. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith* v. *Maryland*, 442 U.S. 735, 740–41 (1979). The curtilage of a home represents the extent of the area surrounding a home that is capable of being recognized as private under the objective component of the reasonable-expectation-of-privacy test. *Oliver*, 466 U.S. at 178–80. Nevertheless, " '[w]hat a person knowingly exposes to the public, even in his own home . . . , is not a subject of Fourth Amendment protection.' " *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz*, 389 U.S. at 351). The portion of the curtilage that is used as a normal route of access for anyone visiting the premises is "only a semi-private area," and thus "observations made from such vantage points are not covered by the Fourth Amendment." LaFave, 1 Search and Seizure § 2.3(f), at 559 (citing *United States* v. *Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975)). By limiting a "knock and talk" to customary entryways, the doctrine conforms to a resident's reasonable expectations of privacy. It treats the police like any other citizen.

The Third Circuit's requirement that Officer Carroll use the front door muddies this straightforward jurisprudence. By requiring an officer facing multiple customary entryways to knock only at the front door, or to divine which of the apparently customary entryways is "the" primary entryway, the Court of Appeals has created a bright-

line rule that impedes legitimate information-gathering while furthering none of the interests the Fourth Amendment protects. The new rule does not protect property rights any more than restricting "knock and talks" to any customary entryway, nor does it provide more robust protection of a resident's expectations of privacy. Knocking at a back door—so long as it is an entryway that visitors could be expected to use—does not constitute a trespass or disrupt a resident's reasonable expectations of privacy. See *Thomas*, 430 F.3d at 280; *Titemore*, 437 F.3d at 259; *James*, 40 F.3d at 862; *Garcia*, 997 F.2d at 1279–80; *Domicz*, 907 A.2d at 405; *Trimble*, 842 N.E.2d at 801–02. For the same reasons, the Third Circuit's decision also does not provide greater safeguards against non-consensual searches. *Thomas*, 430 F.3d at 277–79.

Instead of furthering the Fourth Amendment's protections, the Third Circuit's decision creates uncertainty and confusion both for police officers and for the courts. Police officers, instead of using their best judgment to decide where visitors may reasonably be expected to approach a residence, are now forced to use the "front door" in every instance (assuming there is one), or risk choosing a door that may turn out not to be "the" primary customary entrance, as later determined by a court or jury. Courts and juries similarly would be faced with this muddy determination, when they could instead be asking simply whether the door the officer used was a door that visitors could be expected to use. Cf. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 350 (2001) (disfavoring rules that create judicial second-guessing and do not aid administrability).

What is more, the Third Circuit's decision contravenes this Court's jurisprudence on the ultimate touchstone of the Fourth Amendment: reasonableness. *King*, 131 S. Ct. at 1856. The animating principle behind the Fourth Amendment is whether an individual has been subjected to an unreasonable search or seizure, reasonableness being determined by the totality of the circumstances facing the officer. *Samson* v. *California*, 547 U.S. 843, 848 (2006). This Court has long held that "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *U.S.*, 282 U.S. 344, 357 (1931). Courts must accordingly assess reasonableness in a fact-sensitive, case-by-case manner. See *Ker* v. *California*, 374 U.S. 23, 33 (1963); *Oliver* v. *United States*, 466 U.S. 170, 177 (1984).

Reasonableness jurisprudence recognizes that police often must make quick decisions in a variety of unique and unexpected circumstances. For that reason, this Court has emphasized that flexibility is inherent in the Fourth Amendment and has refused to reduce the reasonableness standard to rigid, mechanical rules or "Procrustean application." *Ker*, 374 U.S. at 33; see also *United States* v. *Drayton*, 536 U.S. 194, 201 (2002); *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995); *Florida* v. *Bostick*, 501 U.S. 429, 435–37 (1991); *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229 (1973); *United States* v. *Mendoza*, 281 F.3d 712, 717 (8th Cir. 2002) ("[I]t belies common sense to think officers should be forced to comply with formalistic rules when the circumstances direct otherwise.").

But a rigid, Procrustean rule is exactly what the Third Circuit has created by restricting Officer Carroll to "the front door" when another entrance also reasonably appeared to be one where visitors may go. To be sure, bright-line rules are appropriate in some Fourth Amendment settings. But a rigid front-door rule—or a "one customary entrance" rule—fails to track the concerns underlying the Fourth Amendment, and accordingly is ill-suited for such a purpose.

This Court's decision in *Florida* v. *Jardines*, 133 S. Ct. 1409 (2013), is not to the contrary. In *Jardines*, this Court confronted the question whether the Fourth Amendment permits warrantless police officers to use drug-sniffing dogs on a homeowner's porch to investigate the contents of the home, *id.* at 1413, and held that it does not, *id.* at 1417–18. In the course of its opinion, this Court referred to the property-law principle that "the knocker on the front door is treated as an invitation or license to attempt an entry," *id.* at 1415–16, citing "background social norms that invite a visitor to the front door," *id.* at 1416. But this Court did not consider or address whether visitors—and thus police officers—are permitted to approach *only* the front door, or whether a residence could have more than one entrance that visitors could properly approach.

In contrast, the majority and dissent appeared to agree that the contours of permissible visitor and police behavior are defined in reference to what would be customary of ordinary citizens. See *id.* at 1415–16 ("Thus, a police officer not armed with a warrant may approach a home and knock, precisely

because that is 'no more than any private citizen might do.' "); *id.* at 1415 n.2 ("With this much, the dissent seems to agree—it would inquire into 'the appearance of things,' what is 'typica[l]' for a visitor, what might cause 'alarm' to a 'resident of the premises,' what is 'expected' of 'ordinary visitors,' and what would be expected from a 'reasonably respectful citizen[.]' These are good questions." (internal citations omitted)). Thus, the analysis in *Jardines* is consistent with a legal standard that allows police officers the same authority as what is "expected" of "ordinary visitors" in approaching an entryway other than the front door.

The Third Circuit's bright-line rule is unwarranted and inconsistent with this Court's jurisprudence and the decisions of sister courts. The traditional, more flexible "knock and talk" rule, by restricting police officers to customary entryways, as determined by reasonable belief and the totality of the circumstances, capably protects a resident's property, privacy, and freedom rights. Mandating that those officers go to "the front door," or divine which of multiple customary entryways is "the" primary entryway, does not increase the resident's protections, but instead creates unnecessary guesswork for police and courts in dealing with a "relatively simple" concept of the Fourth Amendment. Cf. *Atwater*, 532 U.S. at 347 (disfavoring creation of guesswork for police); *Oliver*, 466 U.S. at 181–82 (same); *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002) (disfavoring rigid rules that "create[] unnecessary difficulty in dealing with . . . relatively simple concepts embodied in the Fourth

Amendment"). This Court should grant certiorari and resolve this question.

It is important to note that, even interpreting the Third Circuit's opinion as advocated by the Carmans in their brief in opposition, the decision still creates a rule that conflicts with the jurisprudence of this Court and the other courts of appeal. In rejecting the jury's finding that Trooper Carroll reasonably approached the back entrance, apparently based on the Carmans' testimony that visitors customarily used the front door, Pet. App. 4a, the Third Circuit has effectively held Trooper Carroll responsible for having actual knowledge of which entrance is the Carmans' customary entrance. That has never been the law. Instead, the question this Court and lower courts have asked for decades in applying the Fourth Amendment is whether an officer's actions were objectively reasonable under the circumstances. See *King*, 131 S. Ct. at 1859. Here, a jury found that his actions were. Whether by limiting Trooper Carroll to the front door, limiting him to only one of multiple customary entryways, or limiting him to the door of the inhabitants' subsequently expressed choosing, the Third Circuit has contravened decades of American jurisprudence and, in so doing, has required a well-intentioned police officer to pay damages for the court's mistake. This Court should intervene.

III. The Third Circuit's holding that its new rule was "clearly established" for purposes of qualified immunity is an important error that merits this Court's review.

If this Court decides to consider the merits of the Third Circuit's new take on the "knock and talk" rule, the Court of Appeals' holding that its new rule was "clearly established" for purposes of § 1983 liability is a serious error that also merits review.

The Third Circuit held that its new rule was "clearly established" based on its earlier decision in *Estate of Smith* v. *Marasco*, 318 F.3d 497 (3d Cir. 2003). Pet. App. 12a–13a. But *Estate of Smith* did not require officers conducting "knock and talks" to use the front door, and indeed did not directly address that question, or the question whether a residence can have more than one customary entrance. Instead, the court explained that officers conducting a "knock and talk" "are allowed to knock on a residence's door or otherwise approach the residence . . . just as any private citizen may," assuming they "restrict their movements to places visitors could be expected to go." *Id.* at 519. The court ultimately remanded the case for further fact finding, explaining that factual questions remained as to whether the officers' entry of Smith's back yard—in that case, after not receiving an answer at the front door—was reasonable under the circumstances. *Id.* at 521. Specifically, the Court of Appeals noted that the trial court failed to consider "the layout of the property or the position of the officers on that property"; "whether the officers followed a path or other apparently open route that would be suggestive of reasonableness"; whether the

officers knew ahead of time that Smith lacked a back door; or whether the officers spent an unwarranted amount of time in the back yard. *Id.* at 521.

Nowhere in *Estate of Smith* did the Third Circuit clearly mandate that officers conducting a "knock and talk" must use the front door or divine one exclusive customary entrance to the residence. Indeed, as Pennsylvania notes in its petition for certiorari, district courts in the Third Circuit did not interpret *Estate of Smith* as issuing such a mandate. See, e.g., *Lease* v. *Tyler*, 2008 WL 2673381, *6 (M.D. Pa. 2008) (holding that an officer did not violate the Fourth Amendment when he approached a "common entrance" on the side of an apartment building).

Nor was there a "robust 'consensus of cases of persuasive authority' "such that a reasonable officer could not have believed that his actions were lawful. See *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999)). Not only was the Third Circuit's new front-door rule not "clearly established" within the Third Circuit, but as discussed in Section I of this brief, four federal courts of appeals and two state supreme courts have reached contrary results, rejecting attempts by residents to limit police officers to the "front door," or to only one of multiple customary entryways. A police officer should not be held liable on the premise that the law is clearly established if highly educated and legally trained judges cannot agree what the law is. See, e.g., *Stanton* v. *Sims*, 134 S. Ct. 3, 7 (2013) (law not clearly established where decisions of this Court and federal circuit in question were equivocal, distinguishable, or had granted qualified immunity,

and the federal and state courts of last resort around the nation were divided).

The Third Circuit's new front-door rule was not "clearly established," and therefore Officer Carroll was entitled to qualified immunity. Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2085 (2011). "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)). A government official's conduct violates clearly established law "when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Id.* at 2083 (citing *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Id.* That was not the case here, where *Estate of Smith* did not address the issue at hand, where even subsequent courts did not interpret it as doing so, and where courts around the nation reached a contrary result. The Third Circuit's holding that Officer Carroll could be subjected to civil liability for approaching a back entrance that he thought was a customary entryway—which approach the jury found reasonable—is a significant error that merits review and reversal by this Court.

CONCLUSION

By holding that an officer who faced multiple customary entryways must begin a "knock and talk" at the front door, or must divine which of multiple customary entryways is "the" exclusive customary entrance, the Third Circuit's decision conflicts with the holdings of other federal and state appellate courts, and is inconsistent with this Court's Fourth Amendment jurisprudence. Moreover, the Third Circuit's holding that its rule was "clearly established" for purposes of qualified immunity is a serious error that merits this Court's review.

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Dated: SEPTEMBER 2014

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